

POVERTY: LEGAL AND CONSTITUTIONAL IMPLICATIONS FOR HUMAN RIGHTS ENFORCEMENT IN NIGERIA

INTRODUCTION

1. 0 ABSTRACT

This work ventilates the problem of poverty in Nigeria, where over 70 percent of the population is living below the poverty line, and the theoretical and practical implications of this for the enforcement of the human rights of the poor, who are completely absorbed in the daily rigours of the struggle for survival in Nigeria. For this class of people, there is a lack of value for human life and dignity, which are the goals of international human rights; they lack access to the basic necessities of life, such as food, clothing, health, education, shelter, etc. They are also excluded and have no voice or power in their communities; they are oppressed, suffer high scale injustice and their rights are violated on a daily basis with impunity on grounds of being poor; worse still, the poor lack effective rights of access to justice.

The above makes human rights grossly deficient for the poor, whose human rights have been turned into mere illusions and ‘empty’ rights, with the poor having no effective means of enjoying or protecting those rights. This work therefore examines whether human rights with all that it promises are really relevant in the life of the poor and whether mere constitutional provisions are sufficient to guarantee human rights in the face of illiteracy, ignorance and economic impediments of poverty. The different rights-based approaches to combating the scourge of poverty on the international plane are considered. This work also analyzes the ways by which the conditions of being poor have robbed the poor of their rights, and in a lucid manner elucidates the many perennial and monumental challenges confronting the poor in accessing justice, a situation which has made it difficult for the poor to escape from the clutches of poverty.

This work firmly believes that if the poor can enjoy all their human rights without exception, they would be empowered to take charge of their lives and be lifted out of poverty. Towards this end, this work conceptualizes mechanisms by which the poor can have equal and effective rights of access to justice in order to claim their rights, demand accountability for actions or policies of government that affect their lives and bring violators of their rights to account. In the course of devising appropriate mechanisms for the poor, this work peruses the existing mechanism in place in Nigeria, finding it inadequate and/or unsuitable for the poor to enforce their rights as a result of its inability to effectively protect their rights.

This work also brings to the front burner the necessity of making social, economic and cultural rights (hereinafter called ‘ESC rights’) justiciable in Nigeria on the basis of interrelatedness of rights, the high level of poverty in Nigeria and in contrast to the issue of the resource dilemma. Also, the need to legally empower the poor as a reinforcement of their human rights is discussed. The obligations of Nigeria on international instruments ratified or acceded to are meticulously analyzed.

The knowledge provided by this work and its findings have been articulated and set out herein, with suggestions calling for a shift from the current practice and trends which inhibit the enforcement of rights of the poor, to legal and institutional reforms, in order to make human rights a reality for all in Nigeria.

This work comprises six chapters. The first deals with the introduction to this work, the challenge of global poverty, and the meaning and measurement of poverty. It also examines the global response to the scourge of poverty by looking at the various rights-based approaches to dealing with the issue of poverty and the main human rights content of these approaches, as their nexus for consideration in this work.

The second chapter discusses the problem of poverty in Nigeria, looking at the depth and indices of poverty in the country. The causes of poverty, especially as peculiar to Nigeria are discussed among other matters. The chapter also looks at government efforts to deal with the problem of poverty in Nigeria, the adequacy or otherwise of such efforts and the implications of poverty for the rights of the poor.

The third chapter dwells on the constitutional framework for fundamental rights enforcement in Nigeria, and examines various components of this, such as the legal mechanism for enforcement under the Fundamental Rights Enforcement Rules, and the procedure for legal redress. The chapter also examines the challenges militating against the enforcement of the rights of the poor. The chapter further looks at the content of the right of access to justice under international law and the existing mechanisms designed to ease access to justice for the poor in Nigeria.

Chapter four conceptualizes the right of equal and effective access to justice by the poor, by carefully examining the public interest litigation model in India and proposes this for adoption in Nigeria, to enable the poor to have effective access to justice. The chapter also examines alternative dispute resolution as a means of providing cheap, flexible and effective access to justice for the poor and as a means to provide choice for the poor. This chapter further examines the content of human rights education and the need for aggressive and sustained human rights education in Nigeria in order to raise and develop human rights consciousness in Nigeria, which knowledge the poor can use to empower and lift themselves out of poverty. The chapter finally examines the need for judicial sector reforms in view of the excruciatingly slow pace of justice in Nigeria.

Chapter five deals with the interrelatedness and the indivisibility of human rights, and justiciability of ESC rights in Nigeria. The chapter further examines the legal status of ESC rights in Nigeria's domestic legal order, Nigeria's obligations under international human rights instruments, especially on domestication and implementation of the provisions of the International Covenant on Economic Social and Cultural Rights (ICESCR). The desirability of having a more cohesive means of securing States' obligations on international human rights instruments they are parties to at the national level, are canvassed and discussed.

The sixth chapter contains the main contributions of this research to legal knowledge, by way of summary of the essential contributions, some of which have been incorporated into or alluded to in the main body of this work, reflections on this work, projection into the future and general concluding remarks.

2.0 BASIC AIMS OF THE RESEARCH

The basic aims of this work are, to highlight the practical and theoretical limitations encountered by the poor in protecting and enforcing their human rights, bearing in mind that the ability of individuals to maintain their dignity and attain their full potential depends on how effectively their rights are protected, and violations can be redressed. Towards this end this work sets out to do the following:

- Examine the problem of poverty in Nigeria and seriatim see how this impacts negatively on human rights enforcement.
- Incisively analyze the question posed by this work, including new initiatives aimed at the enforcement of the human rights of the poor.
- Arrive at a well-founded knowledge base to effectively insulate the human rights of the poor from violations, and to articulate ways of ensuring the efficient protection and enforcement of rights for the poor in Nigeria, as a way to empower them and enable them to break the cycle of poverty.

3.0 IMPORTANCE AND DESIRABILITY OF THE RESEARCH

The practical and theoretical problems confronting the poor in Nigeria in terms of protection and enforcement of their human rights have not been addressed head on and in a holistic manner, such that the poor still groan under systemic rights violations, exploitation, social exclusion and dislocation and legal norms and institutions are in most cases not accessible to the poor, without any effective legal remedy or means of accessing justice, thus making human rights hollow and meaningless to the poor.¹

The different works consulted during the literature review reveal that consideration of the issue on poverty and human rights has been addressed from various perspectives, but not in the context and dimension of a human rights-based access to justice approach as explored in this work. Also, most authors have approached the issue either from a development-based approach or generally, paying scant attention to the human rights

¹ See Hon. Justice Chukwudifu Akune Oputa (1989), *Human Rights in the Political and Legal Culture of Nigeria*, Nigerian Law Publications Ltd., p. 50, making reference to the dictum of *Diplock, L.J.* in *Jaundoo v. Attorney-General of Guyana* [1971] AC (PC) 972 at p. 978, where he stated that these sacred pledges and sublime commitments to the ideals of fundamental rights contained in the Nigerian Constitution, will have a hollow ring unless the fundamental rights which they bestow upon every citizen are buttressed by an efficient legal remedy.

implications of poverty. In addition, some authors have considered the issue based on the need for justification of implementing ESC rights, while others consider poverty and human rights in a context which is similar but different in scope as addressed in this work. The research questions posed by this work have not been specifically addressed in Nigeria, while those similar to this work have not sufficiently incorporated the different perspectives of the area investigated by this research. More so, works which are relevant and important for better understanding of the subject area have been overlooked.

The desirability of investigating a well-founded means of empowering the poor, articulating an effective insulation of their rights and enforcement of the same, towards making human rights - which is an essential element for poverty reduction - a reality for all, makes this work worthwhile. It is believed that this research will be of immense benefit to Nigerian society and an important tool for policy makers, the judiciary, and the legislature for necessary legal and institutional reforms, national institutions for the protection of rights, the human rights community and as an indispensable reference companion to researchers in the subject area.

4.0 METHODOLOGY

The methodology adopted for this research work includes a desk review of existing literature on poverty and human rights. This work carried out a desk review of materials relevant to the subject, especially international, regional and domestic human rights instruments, national Constitutions, on human rights generally and relating to poverty specifically. Relevant United Nations (UN) and its agencies' documents, resolutions and declarations relating to human rights and poverty were consulted and sourced based on their relevance. Journal articles, textbooks and case law, which consider poverty and human rights, were also reviewed. Also consulted are reports and publications of international and local human rights NGOs, other international organizations and institutions, newspaper reports and other materials, relating to poverty and human rights. The materials that have peculiar relevance to poverty and human rights served as the basis for their selection for this work. The hard copies of some of these materials were consulted while some were sourced from the internet.

A six-month field study was also conducted in Nigeria on the subject, using an 'open-ended discussion method'. The fieldwork was conducted from April - October 2006. This involved open-ended interviews/discussions with a cross-section of the people (especially the masses), non-governmental organizations which are active players in the field of human rights and institutions relevant to human rights enforcement with regard to the questions posed by this work via the themes put together for the same. This method was preferred over questionnaires, for the reason that they might prove to be too stereotyped and might not elicit effective responses from the people. Added to this is the fact that the target of this research being the poor would no doubt be greatly handicapped by the use of questionnaires.

On arrival in Nigeria, before embarking on the fieldwork and after pre-testing the themes for the interviews, several letters were caused to be written to non-governmental organizations (NGOs), civil society groups and some notable individuals, who are active players in the field of human rights in Nigeria, intimating them about this research work and of the intention to hold interviews/discussion sessions with them on the themes of the same. Similar letters were written to government ministries, institutions and agencies, whose functions have a bearing on human rights protection and enforcement in Nigeria. In several other cases, formal and informal discussion/interview sessions were held with a broad spectrum of people from all walks of life, on the themes of the research.

The people interviewed cut across both sexes, who were 18 years of age and above. In all, discussion sessions were held with 13 human rights NGOs and civil society groups, 12 government institutions, departments and agencies, as well as several other individuals that were either formally or randomly interviewed, including a foremost retired Justice of the Supreme Court of Nigeria and a notable legal practitioner and human rights activist. A list of some of the interviewees (mainly government institutions and human rights NGOs) is annexed to this work.

The services of two lawyers were engaged as research assistants, to complement the research efforts, assisting in logistics and in taking backup notes of discussions in long hand, when required. A midget tape recorder was also procured, which was used to record conversations with most of the people interviewed, in order to be able to recap the substance of discussions vividly. Interpreters were also engaged on an *ad hoc* basis to make it possible to communicate with people who were illiterate in the different communities covered by this work. The recordings have been transcribed and the valuable inputs made by those interviewed have been extracted and incorporated into this work, which has added to its richness.

However, some of the organizations and other notable individuals written to could not make time to attend the discussions, owing to the non-availability of key persons or to pressing engagements. Also, members of the Committee on Human Rights of the House of Representatives, the lower chamber of the National legislature could not be reached, despite several efforts and the assistance of some colleagues, apparently owing to their then preparations for the general elections later held in April, 2007.

It is important to note, that the fieldwork was very time-consuming, as considerable amounts of resources (human and material) were spent and considerable time lost, due to seeking approval from government institutions and agencies, and in following up the several letters that were sent out and in booking appointments for discussions. Also, several visits had to be paid to some institutions in order to get their response/approval and several hours were spent on waiting to be attended to in some cases. In some others, the letters sent to them could not be traced at all.

The interview sessions were very stressful especially for the researcher and his team. Some members of the public were too time conscious to devote the necessary time or at all, to discussing all the themes of the research. The researcher also found it very

stressful and monotonous having to conduct interviews on the same themes with several people and institutions. Some of the people interviewed were sometimes impatient during interviews. Most frustrating were their interjections during some interviews, as some of the people being interviewed sometimes punctuated the same by frequent phone calls and conversations with other parties, while others digressed from the topic.

The bureaucracy, coupled with time constraints among other factors, resulted in an inability to cover the four geo-political zones² of the country as earlier projected, and as such the fieldwork was limited to three zones, resulting in the Eastern zone being completely left out. The fieldwork was restricted to selected cities and towns in the three zones of the North, West and South.

Most of the people interviewed, who were either well or fairly well educated were very enthusiastic about the research topic and offered very useful assistance, contributions, etc. Those in the human rights community and some in the public institutions commended the research efforts, especially in deeming it fit to conduct fieldwork in Nigeria which they said will divorce the research from a purely theoretical exercise. However, in some other cases it took quite considerable efforts to explain the research and purpose of the same to those who were illiterate. Some of the people interviewed gave responses that revealed a poor understanding of the themes put together for discussion and also of the question posed by this work, while some of the people expressed total apathy towards contributing to the research, and this was probably borne out of their disenchantment with the legal system and the 'illusory rights'.

On the other hand, some of the illiterates and functional illiterates responded very well to the study, and made useful contributions based on their level of understanding. Most of the people interviewed complained of and decried police harassment and extortion from hapless citizens. Meanwhile students, especially female ones, complained about finding solutions to incessant lecturers' sexual harassments in tertiary institutions, which they claimed infringed their rights.

Other constraints included the fact that public servants in the mainstream government ministries were not favourably disposed to the fieldwork, based on what they termed the civil service culture of only being seen but not heard. Also, no judicial official could be interviewed despite the spirited efforts made in this regard, primarily due to the conservative nature of the judiciary. The only approval given by the judiciary was that of the Chief Judge of Lagos State, but the requirement of a second approval in order to have a one on one discussion with judicial officers could not be secured before the fieldwork was rounded up in Nigeria.

Despite the challenging nature of the fieldwork, it was nevertheless exciting and richly rewarding. It reinforced the practical desirability of this research judging from the

² These zones are now six, comprising of North-Central, North-West, North-East, South-West, South-South and South-East.

observations and findings made. It afforded this work the opportunity of sourcing first-hand information, some of which would otherwise not be readily available in routine journals/books, and this has assisted this work in drawing up conclusions to some of the themes in one way or another. The NGOs and civil society groups gave maximum support and cooperation to the fieldwork and even obliged several copies of their publications relevant to the research work free of charge, except for one of the NGOs which sold its own materials. Similar cooperation was received from some government agencies, while some government institutions gave low cooperation.

4.1 REFLECTIONS ON THE METHODOLOGY

Reflecting on this work, one needs to revisit the issue of the methodology adopted by this work as a result of the fact that it is not a method commonly used in legal research. The use of interviews³ as a research methodology is to some extent controversial as a result of concerns of the likelihood of leading questions and the ethical concerns of interviewing about private issues for public reading.⁴ However, the method which was developed from conversations⁵ is itself an old way of obtaining systematic knowledge especially in history, social sciences and medicine.⁶ However, researchers in an ever-increasing number of disciplinary and applied fields have been turning to interviews to help gather rich, detailed data directly from participants⁷ and interviews have turned out to be a way of doing strong and valuable research.⁸

Despite ethical concerns on the use of interviews, faith has been built on the results of this type of methodology as trustworthy and accurate, especially if the relationship between the interviewer and the interviewee that produced the result has not prejudiced the result.⁹ The use of interviews as a means of gathering data is no longer limited to social sciences researchers and are now a universal mode of systematic inquiry.¹⁰

One of the essentials in this type of methodology is asking open questions and not leading ones. For instance, the first step adopted during the fieldwork was that in any interview session, the researcher normally introduced himself and informed

³ An interview is a specific form of conversation where knowledge is produced through the interaction between an interviewer and the interviewee. See Steiner Kvale (2007), *Doing Interviews*, Sage Publications Ltd, London, p. xvii.

⁴ Ibid.

⁵ The term interview is of recent origin and means, an interchange of views between persons conversing about a theme of common interest. See Steiner Kvale, op. cit. p. 5.

⁶ Ibid. See also Andrea Fontana and James H. Frey, "The Interview: From Structured Questions to Negotiated Text", in Norman K. Denzin and Yvonna S. Lincoln (eds.) (2003), *Collecting and Interpreting Qualitative Materials*, Sage Publications, Inc., second edition pp. 65-67.

⁷ See Barbara Sherman Heyl, "Ethnographic Interviewing", in Paul Atkinson, Amanda Coffey, Sara Delamont, John Lofland and Lyn Lofland (eds.) (2007), *Handbook of Ethnography*, Sage Publications, p. 369.

⁸ See Steiner Kvale, op. cit. p. 8.

⁹ See Andrea Fontana and James H. Frey, "The Interview: From Structured Questions to Negotiated Text", in Norman K. Denzin and Yvonna S. Lincoln (eds.) (2003), op. cit. p. 63.

¹⁰ Ibid.

interviewees about the research topic for the interview and the reasons why the interview was being conducted. This was to make them feel comfortable while responding to questions. They were also informed that participating will assist in the outcome and quality of the research, which will benefit society in general but the poor in particular. Interviewees were informed of their right to discontinue at any time. These issues were clarified and any question raised by an interviewee was answered before the interview proper commenced. Before each interview session was closed the researcher usually asked the interviewee if he/she had anything to add or ask before the interview ended.

Throughout the interview journey during the fieldwork, open questions were asked and the interviewees were left to do all the answering by fully expressing their views except when they were derailing completely off the research topic, and had to be cut short in order not to waste valuable time on issues that were not connected with the topic. They were then referred back to the topic guide. In order for the researcher to maintain neutrality and not colour the responses given, the researcher throughout the fieldwork never expressed his personal views on the issues. The interviewees were however sometimes asked for specifics, in order to clarify or back up their views, and the strength of their view was also tested by counter questions.

The anonymity of interviewees was assured in order to make them feel free to express their views, and for this reason with the exception of notable human rights activists NGOs officials, and other individuals who freely volunteered their names, most of the interviewees were not asked to give their names in order for them to feel free and safe to express their views and be assured that nothing more than their views were required, and that no risk would result to them from participating in the study.¹¹ Furthermore, the nature of the research topic and targeted social group itself makes interview investigation most suitable for the reasons hereinafter stated.

The personal presence of the researcher on the field as the main instrument of gathering knowledge assisted in making quality choices and boosted personal experience in analyzing opinions, views, accounts, stories of those interviewed and hopes. Thus, special attention was paid to the particular circumstances of those interviewed (their facial and bodily expressions during the interviews) and cases given as examples, as this shed further light on their understanding of the research topic. The researcher had to make on the spot decisions whether to follow new leads during the interview or to stick to the guide. The researcher's knowledge of the theme of study enabled him to make swift decisions as to when to follow a new lead and ability to pose crucial questions.

Also the interview method brought simplicity and flexibility to the fieldwork because there were no rigid concepts or hypotheses adopted for this purpose and the research themes were mainly used as a guide and were refined to be suitable or as required in the

¹¹ See H. Russell Bernard (2006), *Research Methods in Anthropology*, fourth edition, AltaMira Press, Oxford UK, p. 215.

field. This made it easy to carry out the fieldwork irrespective of the social class of the members of the field under study.

Although, there is need to protect the confidentiality of interviewees, the interviewees' consent to publication of the views expressed by them may be implied since they were duly informed that the interview was required in connection with a doctoral research project. This is coupled with the fact that, throughout the interview journey, the consent of interviewees and of their superiors where necessary were sought and obtained before each interview was tape recorded. It is thus presumed that they will not object to the publication of the interviews but there were no written agreements signed in respect of any interviewee to this effect. Besides, the interviewees are kept anonymous. There were however instances when some interviewees requested that the tape recorder be paused, at a time when they wanted to express views they regarded as confidential and not to be published. In that case, such issue was excluded from the interview.

Another relevant issue in this type of methodology concerns whether interviewees should have a say in how their statements are transcribed. Considering the number of interviewees, it will be extremely difficult to have large numbers of interviewees as in this work verify their statements. With the exception of a few individuals, some of the views expressed can hardly be traced to the interviewees. It must however be borne in mind that the interviewer has a duty to transcribe the interview as accurately as possible, with honesty and fairness, and in the event of a disputed transcription, this can always be cross-checked with the tape recorded interview. However, the tapes for the fieldwork will be disposed of six years after publication of this research work. There is thus no reason to misrepresent interviews since they are for academic research purposes and there is no political agenda.

Having taken all the above precautions required in a methodology of this nature, the methodology used by this work is considered to be in order. Also, the method has been successfully used in other disciplines and in notable research works, some of them of a legal nature.¹² The nature of the class of people in focus in this work also makes this type of methodology most desirable.

¹² See The Voice of the Poor series cited in the work, the works of both the Special Rapporteur and Independent Expert on human rights and extreme poverty, also used this methodology in parts; see also Marco Aurelio Ugarte Ochoa, "Poverty and Human Rights in the Light of the Philosophy and Contributions of Father Joseph Wresinski", in Willem van Genugten & Camilo Perez – Bustillo (eds) (2001), *The Poverty of Rights: Human Rights and the Eradication of Poverty*, Zed Books London, p. 27 on human rights, made allusions to this type of methodology; this methodology was also used by the Commission on Legal Empowerment of the Poor; see *Making the Law Work for Everyone Volume I, New York 2008* and *Making the Law Work for Everyone, Volume II, Working Group Reports* (pre-publication edition) New York.

5.0 LIMITATIONS OF THE RESEARCH

This work is considered limited in some respects, owing to some issues which are deliberately or inadvertently left out and are considered below.

In considering the causes of poverty, it is important to indicate that this work did not pay much attention to the contribution of external forces to poverty.¹³ Part of the reasons for this is because of this work's assumption and as considered below, that in the particular case of Nigeria, corruption (aided by lack of good governance) is by far a major cause of poverty/and or a factor that has deepened and perpetuated poverty in Nigeria than any other factors combined. Pogge himself acknowledged that 'incompetence, corruption and tyranny entrenched in governments, social institutions, and cultures of many developing countries', as important factors of world poverty.¹⁴ The Bangalore Declaration and Plan of Action equally affirmed that '...impunity of perpetrators of grave and systematic violations of economic, social and cultural rights, including corruption by State officials is an obstacle to the enjoyment of economic, social and cultural rights which must be combated.'¹⁵

Furthermore, this work is deemed to be limited by the inability to fully cover the projected four geo-political zones of North, West, East and South Nigeria in the fieldwork owing to administrative bottlenecks and time constraints. The ability of the fieldwork to cover three zones out of the proposed four, leaving only one out - the East - coupled with the number of people interviewed in different places across zones covered, permits generalizing in this work. This is based on the firm belief that no significant differences would have been found in the zone not covered, since the situations found in the zones covered basically exudes the same problems.

Also, the inability to get input from the serving judges is seen as a limitation in this work since they have a central role to play in the model of access to justice proposed in

¹³ Such as free activities of WTO, globalization and the protection of their markets by the West, etc., the global economic order and their effects on the poor has been excellently addressed by other authors. See Thomas Pogge, "Poverty and Human Rights", in Rhona K.M. Smith and Christien Van den Anker (eds) (2005), *The Essentials of Human Rights*, Hodder Arnold, London
op. cit.; Patricia Helena Massa Arzabe, "Human Rights: A New Paradigm", in Willem van Genugten & Camilo Perez – Bustillo (eds) (2001), *The Poverty of Rights: Human Rights and the Eradication of Poverty*, Zed Books London, pp. 36-37 which claims that 'the intervention of international financial institutions such as the World Bank or the IMF in national economic and monetary policies is in many cases increasing extreme poverty.'; Bauman, Zygmunt (1988) 'On glocalization: or globalization for some, localization for others', Thesis Eleven, No. 54, Sage Publications, London cited in Patricia Helena Massa Arzabe, "Human Rights: A New Paradigm", in Willem van Genugten & Camilo Perez – Bustillo (eds) (2001), op. cit. p. 36; also, the impact of globalization on human rights has been noted by the UN General Assembly in A/RES/60/152 of 16 December 2005 para 5; the United Nations Development Programme (UNDP), while noting in 1997 that a quarter of the world's people remain in severe poverty in a global economy of US\$25trillion, it nevertheless blamed the shameful inequalities on the failures of national and international policy. See UNDP, The Human Development Report 1997 p. 7.

¹⁴ See Thomas W. Pogge (2002), *World Poverty and Human Rights*, Malden, USA, p. 21.

¹⁵ Adopted at Bangalore, India 1995 (E/CN.4/1996/NGO/15) Para 13.

this work. The views expressed by a retired Justice of the Supreme Court of Nigeria during the fieldwork, although beneficial, may not fill the vacuum of contributions from serving judicial officers.

This work conceives the fact that going to India to get first hand information on the theory and actual practice of PUBLIC INTEREST LITIGATION (PIL) and having the opportunity of gauging the pulse of the masses on its potency and efficacy would have boosted this work. However, the work was able to access very recent works in this area by two authors,¹⁶ one of whom is an Indian and the other travelled down to India to research the situation and even conducted some interviews on the ground. In spite of the limitation of this work not being able to visit India, the said most recent works have bridged this limitation and enriched this work. These works were published in 2006 and 2008 respectively and provide a measure of freshness.

It is however imperative to state that the Indian model of PIL proposed in this work should be judged not by the weaknesses it may exhibit but largely by what it can deliver. As such, the access to justice human rights-based approach to poverty reduction advocated in this work has not pretended to be a perfect one. This work doubts if there is any such approach and an attempt to conceptualize one may be utopian.

¹⁶ See S. Muralidhar (2002), *Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary*, a paper presented at the First Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002 (No. 2) and Sandra Fredman (2008), *Human Rights Transformed: positive rights and positive duties*, Oxford University Press Inc., New York.

CHAPTER 1

CHALLENGE OF WORLD POVERTY, MEANING AND MEASUREMENT OF POVERTY AND GLOBAL RESPONSE TO POVERTY

1.1 INTRODUCTION

This work researches into the practical and theoretical implications of poverty for the enjoyment and enforcement of human rights in Nigeria vis-à-vis the fundamental rights¹⁷ enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter called 'the 1999 Constitution'). It is permissible however to refer to the fundamental rights as human rights in the Nigerian context, in as much as they do not derogate from the human rights under international instruments. Therefore in this work, these terms may be used interchangeably.

This research delves into the various ways by which poverty has incapacitated the enjoyment and enforcement of the legal and human rights of the people in Nigeria.¹⁸ This work will first examine the global problem of poverty and attempt to peruse the different rights-based approaches as poverty reduction strategies at the international level before dealing with the scourge of poverty in Nigeria, efforts at national level to reduce poverty and implications of poverty for rights enforcement and conceptualization of this work's human rights approach to poverty reduction through access to justice.

This work drew inspiration from the fact that in spite of the 1999 Constitution's devotion of the whole of Chapter IV to human rights, (similar to the ones in the Universal Declaration on Human Rights (hereinafter called 'UDHR') coupled with a mechanism for its enforcement, these rights remain elusive and meaningless to the poor, who are in the majority in Nigeria,¹⁹ in terms of enjoyment and protection. Also is the fact that ESC rights are not guaranteed in Nigeria thus inhibiting their enjoyment and protection.

¹⁷ In Nigeria, a distinction is drawn between 'fundamental rights' and 'human rights'. This was drawn in *Chief Omu Uzoukwu v. Igwe Chukwusudebelu Ezike Ezeonu II* [1991] 6 N.W.L.R. (Pt. 200) 708, at p. 760, where the court stated that what is entrenched in Chapter IV of the Constitution is 'Fundamental rights' and it refers to the narrower rights guaranteed under the domestic realm, while 'Human Rights' refers to the wider concept of rights derived from natural rights which are contained in the United Nations declaration of rights, as embodied in the international human rights instruments, which now form part of international law. Human rights can also be traced to a number of other documents on rights, such as the Magna Carter of 1215 and Bill of Rights 1689, the American Bill of Rights 1791, and the French Declaration of the Rights of Man and the Citizen of 1789.

¹⁸ Nigeria is the most populous black nation in sub-Saharan Africa, and according to the results of the population census conducted in 2006, the country has a population of approximately 140,000,000 (one hundred and forty million). According to the results released in January, 2007 and ratified by the Federal Executive Council at their meeting of 9th January, 2007 the actual figure is 140,003,542. See Bolade Omonijo, Rotimi Ajayi & Ben Agande, *Census: Kano beats Lagos*, The Vanguard, 10 January 2007 at <<http://www.odili.net/news/source/2007/jan/10/399.html>> accessed 10 January 2007.

¹⁹ Data indicates that over 70% of the Nigerian population lives below the poverty line and this assertion will be substantiated in this work.

1.2 CHALLENGE OF GLOBAL POVERTY

The problem of the high level of poverty in the world has posed serious challenges to the international community more than ever before. At the Millennium Summit of the United Nations held from 6 to 8 September 2000, the Secretary-General, Kofi-Anan, in his report to the UN General Assembly titled 'We the peoples: the role of the United Nations in the 21st century,'²⁰ brought the huge problem of poverty and other challenges facing the world to the attention of the world. He stated for instance that 'grinding poverty and striking inequality persist within and among countries even amidst unprecedented wealth.' and that some people of the world 'enjoy better standards of living than ever before, many others remain desperately poor. Nearly half the world's population still has to make do on less than \$2 per day. Approximately 1.2 billion people - 500 million in South Asia and 300 million in Africa - struggle on less than \$1. People living in Africa south of the Sahara are almost as poor today as they were 20 years ago. With that kind of deprivation comes pain, powerlessness, despair and lack of fundamental freedom - all of which, in turn, perpetuate poverty.'²¹

Also, according to the World Bank's 2000 report, 'the world has deep poverty amid plenty.' The Bank estimated that 'of the world's 6 billion people, 2.8 billion - almost half - live on less than \$2 a day and 1.2 billion - a fifth - live on less than \$1 a day.'²² As at 2003, a total of about 2.8 billion of the world's people are reported to be living in a chronic state of poverty and daily insecurity, a number which was claimed not to have had any significant change since 1990.²³ About 800 million people who are living in the developing world and 24 million in developed and transition economies are reported not to have enough to eat. It was also revealed that the phenomenon of poverty is prevalent in Asia and Africa.²⁴

In sub-Saharan Africa, the region where the country on which the research was based is located, for instance, poverty is said to be persistent with an increment in the number of poor people 'by almost 90 million in a little more than a decade (1990-2001)'.²⁵ Africa is said to be host to 'the worst forms of poverty, an estimated 59 percent of the rural population live in extreme poverty, compared with 43 percent of the urban population.'²⁶ 'In Sub-Saharan Africa, death by starvation or malnutrition is at the

²⁰ See A/54/2000.

²¹ Ibid at p. 12.

²² See The World Bank (2000), *World Development Report 2000/2001: Attacking Poverty*, Oxford University Press, Inc. p. 3.

²³ See Commission on Human Security (2003), *Human Security Now*, Communications Development Incorporated in Washington, DC p. 73.

²⁴ According to the Commission on Human Security, 'a fifth of the world's people - 1.2 billion - experience severe income poverty and live on less than \$1 a day, nearly two-thirds of them in Asia and a quarter in Africa. Another 1.6 billion live on less than \$2 a day. See Commission on Human Security, op. cit. p. 73.

²⁵ See Report on the World Social Situation 2005 (UN General Assembly A/60/117 of 13 July 2005) pp. 51 and 55.

²⁶ Ibid.

horizon of everyday life, a threat that erodes the social fabric.’²⁷ A glooming view of the poverty level in Africa’s sub region has been captured in many other reports.²⁸

The 2005 World Summit held from 14 – 16 September 2005 and well attended by world leaders and representatives, was a follow-up summit meeting to the United Nations Millennium Summit in 2000. The summit reviewed the progress made on attaining the Millennium Development Goals²⁹ stating among other things that despite major gains in the fight to eradicate poverty worldwide, almost 20 percent of all people continue to live in extreme poverty. All other regions have experienced little change and setbacks since 1990. Sub-Saharan Africa, in particular, was singled out as having achieved little or no progress.³⁰

Also in 2005 the world’s attention shifted to the plague of poverty around the world, especially in Africa, and the consequent pressure that mounted on the leaders of the world’s most industrialized nations - the G8 - to address world poverty at their summit in Gleneagles, Scotland, from 6 – 8 July, 2005. Some of the outcomes of the Summit relevant to poverty alleviation were the agreement by the G8 leaders to double aid for Africa by 2010 and to cancel all debts owed by eligible heavily indebted countries to IDA, the International Monetary Fund (IMF) and the African Development Fund.³¹

In the United Nations Development Programme (UNDP)’s Human Development Report, 2006, Sub-Saharan Africa has been reported to be off the track of meeting the Millennium Development Goals, because it is the only region that has witnessed an increase both in the incidence of poverty and in the absolute number of poor. Some 300 million people there - almost half of the region’s population - were reported to be living on less than \$1 a day. While the world as a whole is on track for achieving the 2015 target of halving extreme income poverty, Sub-Saharan Africa is off track.³²

The United Nations Economic and Social Council Report 2006, supports the above and indicates that the pattern of growth rates in Africa remain insufficient to reach the Millennium Development Goals. The report stated that while African countries have achieved higher growth rates than in previous decades, they still fall short of the threshold required to accelerate poverty alleviation and achieve the Millennium

²⁷ See Commission on Human Security, op. cit. p. 74.

²⁸ See For example, the final report of Mr. Leandro Despouy, Special Rapporteur on human rights and extreme poverty, (E/CN.4/Sub.2/1996/13) para. 58, which states: ‘In Africa, half the population is impoverished. As a continent, Africa has 16 percent of the world’s poor, most of them (60 percent) in rural areas of sub-Saharan Africa.’ Ibid.; see Shaohua Chen and Martin Ravallion (2004), *How have the world’s poorest fared since the early 1980s?*, The World Bank Development Research Group, p. 1, which stated that sub-Saharan Africa has the highest incidence of extreme poverty and the greatest depth of poverty.’

²⁹ The Millennium Development Goals are explained in detail in footnote 127.

³⁰ See United Nations Department for Economic and Social Information and Policy Analysis, op. cit. p. iv.

³¹ See G8 Gleneagles 2005, Summit Documents

<<http://www.g8.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1119518698846>> accessed 6 September 2007.

³² See UNDP, Human Development Report 2006, *State of Human Development*, Palgrave Macmillan, New York pp. 8 - 9.

Development Goals. On a medium-term basis, only four countries in that region met the 7 percent growth threshold: Equatorial Guinea, Chad, Angola and Mozambique, which excludes Nigeria with the amount of money made from oil and other revenue.³³

The above reports and the apparent inability of the African countries to meet the Millennium Development Goals has led to the United Nations Secretary-General, Ban Ki-moon's launching of the Millennium Development Goals Africa Steering Group on 14 September 2007 with major development partners in order to assist the continent in meeting the Millennium Development Goals, in particular that of combating poverty, illiteracy and diseases among others, by 2015.³⁴

Although the phenomenon of poverty is not new in society, world attention has been shifted to this scourge in recent times more so than in the past. The Millennium Development Goals, which was adopted in 2000 by world leaders, have brought to the world's agenda, the predicament that billions of people face by the scourge of poverty. The Millennium Development Goals has, as one of its targets, the halving of extreme poverty in the world by 2015. There have been efforts in the past to combat the problem of global poverty; one was the World Summit for Social Development also held in March 1995 in Copenhagen, where the central issue was about development and the conquest of poverty.

The Fourth World Conference on Women, held in Beijing in 1995, also addressed the issue of world poverty, by calling for the eradication of poverty based on sustained economic growth and promotion of women's economic independence, including employment and eradication of the persistent and increasing burden of poverty on women by addressing the structural causes of poverty.³⁵ There was a declaration of the first United Nations Decade for the Eradication of Poverty (1997-2006) with the theme "Eradicating poverty is an ethical, social, political and economic imperative of humankind".³⁶ The Social Summit in Copenhagen in 1995 provided the ground for that declaration, where it was agreed that the General Assembly, at its fiftieth session, should declare the first United Nations decade for the eradication of poverty.³⁷ The goals of the Decade were later reflected in the Millennium Development Goals in 2000.³⁸

³³ See The UN Economic and Social Council, *Overview of the Economic Report on Africa 2006: "Recent economic trends in Africa and prospects for 2006"* p. 8.

<<http://daccessdds.un.org/doc/UNDOC/GEN/N06/328/19/PDF/N0632819.pdf?OpenElement>> accessed 20 May 2007.

³⁴ See Millennium Development Goals, <<http://www.un.org/millenniumgoals/>> accessed 25 October 2007.

³⁵ See Beijing Declaration 1995 paras 16 and 26.

³⁶ These goals include: achieving a substantial reduction of overall poverty and the eradication of extreme poverty by a date set by each country; reductions in infant and child mortality; reductions in maternal mortality and child malnutrition; improvements in life expectancy; and access to basic social services, especially among women.

³⁷ See UN Division for Social Policy and Development, Department of Economic and Social Affairs, First United Nations Decade for the Eradication of Poverty (1997 – 2006): Progress and the Road Ahead, Report of an Expert Group Meeting and a Roundtable on Building inclusive financial sectors for poverty reduction held in Bangkok, Thailand, 6-8 July 2005 p. 2.

³⁸ Ibid.

1.3 WHAT CONSTITUTES POVERTY

As a result of the multidimensional nature of poverty, it has proved to be a term that cannot be easily defined in a precise form contrary to the rather usual narrow construction of the term in terms of income or consumption patterns as mostly previously done when measuring poverty.³⁹ The global efforts to tackle poverty briefly mentioned above have signalled a marked departure from the past when poverty was viewed purely an economic factor and was often perceived as the fault of the poor, but now poverty has been recognized as a social and human rights issue, by reason of acts of inequality, social exclusion, disempowerment and lack of capacity.⁴⁰

Many definitions have been proffered for the term 'poverty', which can be 'relative or absolute poverty'. We shall address some of these in order see where they interface.

Adopting a sociological approach, poverty has been described as relative and that it should be measured in terms of the standards specific to a particular place and time.⁴¹

In other words, individuals, families and groups in the population can be said to be in poverty when they lack the resources to obtain the types of diet, participate in the activities which are customary, or at least widely encouraged or approved, in the societies to which they belong. This is explained as the inability to participate in approved social activities which are considered normal, such as visiting friends or relatives, having birthday parties for children and going on holiday.⁴²

Absolute poverty on the other hand has been defined as a judgment of basic human needs and is measured in terms of the resources required to maintain health and physical efficiency. Absolute poverty is often known as subsistence poverty, based on assessments of minimum subsistence requirements. Most measures of absolute poverty are concerned with establishing the quality of and amount of food, clothing and shelter deemed necessary for a healthy life. Nutrition is measured by factors such as intake of calories and protein; shelter is measured by quality of dwelling and degree of overcrowding; health is measured by factors such as the rate of infant mortality and the quality of available medical facilities.⁴³

³⁹ "Poverty is recognized as a broader concept than simply the mere absence of money, the overall prevalence of poverty as traditionally measured refers to the percentage of people whose income or consumption falls below some established poverty line fixed in terms of a standard of living indicator." See UN Department of Economic and Social Affairs, Report on the World Social Situation 1997, New York, pp. 65-66.

⁴⁰ See Poverty around the World, <<http://www.globalissues.org/TradeRelated/PovertyAroundTheWorld.asp>> accessed 12 February 2007.

⁴¹ The definition is in line with that given in the Report of the Independent Expert on human rights and extreme poverty, which stated that 'Relative poverty. Poverty defined by standards that can change across countries or over time.' See Report of Ms. A-M. Lizin, the Independent Expert on human rights and extreme poverty, Part II, para 43 (b) E/CN.4/1999/48 29 January 1999.

⁴² See Haralambos and Holborn (1995), *Sociology: Themes and Perspectives*, HarperCollins Publishers, Fourth Edition, p. 130.

⁴³ Ibid at p. 125.

The above authors have further stated that the concept of absolute poverty has been pushed beyond the notion of subsistence and material poverty to include basic cultural needs, such as education, security, leisure and recreation, such that the proportion of children enrolled at school is one indication of the level of educational provision. The number of violent deaths relative to the size of the population is one indication of security and the amount of leisure relative to work time is one measure of the standard of leisure and recreation.⁴⁴

The Copenhagen Declaration on Social Development,⁴⁵ stated on poverty as follows:

'Poverty has various manifestations, including lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterized by a lack of participation in decision-making and in civil, social and cultural life.'

Also adopting a development approach, at the World Summit for Social Development in Copenhagen, Denmark, held in March 1995 where some of the agreements reached by world leaders were to put people at the centre of development and to make the conquest of poverty one of the objectives of development,⁴⁶ the Programme of Action of the Social Summit stated on poverty as follows:⁴⁷

"Poverty has various manifestations including lack of income and productive resources sufficient to ensure sustainable livelihoods: hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterized by lack of participation in decision making and in civil, social and cultural life."

Adopting a rights-based approach, the United Nations Committee on Economic, Social and Cultural Rights, has defined poverty 'as a human condition characterized by the sustained or chronic deprivation of resources, capacities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.'⁴⁸

⁴⁴ Ibid, a definition which is in tandem with the development approach of poverty, as will be seen later in this work.

⁴⁵ See World Summit for Social Development Copenhagen, Denmark 6-12 March 1995 para 19. See note 126 for an explanation of the World Summit.

⁴⁶ See UN Department of Economic and Social Affairs, World Summit for Social Development, Copenhagen, 1995 at <<http://www.un.org/esa/socdev/wssd/>> accessed 16 June 2007

⁴⁷ See Programme of Action of the Summit para 19.

⁴⁸ See Human Rights in Development, at <<http://www.unchr.ch/development/poverty-02.htm>> accessed 30 March 2007.

The Special Rapporteur on the Promotion and Protection of Human Rights, Mr. Leandro Despouy, in his final report on human rights and extreme poverty described poverty as follows:⁴⁹

'What is poverty, legally speaking, but a string of misfortunes: poor living conditions, unhealthy housing, homelessness, failure - often - to appear on the welfare rolls, unemployment, ill-health, inadequate education, marginalization, and an inability to enter into the life of society and assume responsibilities? The distinguishing feature is that these deprivations - hunger, overcrowding, disease, and illiteracy - are cumulative, each of them exacerbating the others to form a horizontal vicious circle of abject poverty.'

In a definition closely linked to that of the Committee on Economic, Social and Cultural Rights and Mr. Leandro Despouy, Mr. Arjun Sengupta, the second mandate holder of the Independent Expert on the question of human rights and extreme poverty⁵⁰ in his first report to the Commission on Human Rights adopted a working definition of poverty as 'a composite of income poverty, human development poverty and social exclusion.'⁵¹ He regarded extreme poverty as extreme or severe deprivation in terms of the aforesaid three elements of poverty, especially when all these elements of deprivation coexist. In other words, according to the Independent Expert, 'extreme poverty can be regarded as a union of sets of people who are extremely income poor, extremely human development poor and extremely socially excluded'⁵²

A poverty assessment report published by the World Bank in 1999, which gathered the voices of over 60,000 poor women and men in 60 developing countries and transition economies around the world, revealed the many ugly facets of poverty.⁵³ The report, which explores poor people's definitions of poverty, revealed five main findings which adhered to the development and rights-based definitions, thereby indicating that poverty is not mainly an issue of economic construction. They are:

- i.) Poverty is complex and multidimensional by a convergence of many factors;
- ii.) Poverty is routinely defined as the lack of what is necessary for material well-being, especially food, housing, land, education and other assets; Poverty is the lack of multiple resources leading to physical deprivation
- iii.) Lack of voice, power and independence, subjection to exploitation, vulnerability to rudeness, despair, hopelessness, humiliation and inhumane treatment. These are the important psychological aspects of poverty;

⁴⁹ See E/CN.4/Sub.2/1996/13, para 7.

⁵⁰ See He was appointed pursuant to the Commission on Human Rights Resolution 2004/23.

⁵¹ See E/CN.4/2005/49 para 18 p. 8.

⁵² See A/HRC/5/3 of 31 May 2007 para 8 p. 7.

⁵³ See Deepa Narayan, Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch Schulte (1999), *Voices of the Poor-Can Anyone Hear Us?*, Poverty Group, PREM World Bank, vol. I, p. 26. The purpose of the study was to enable a wide range of poor people in diverse countries and conditions to share their views in such a way that they could inform and contribute to the concepts and content of the World Development Report 2000/01 (WDR) on the theme of poverty and development.

- iv.) Absence of basic infrastructure - roads, transport, water and health facilities are critical; and
- v.) Lack of physical, human, social and environmental assets, rather than income, making them vulnerable to risk.⁵⁴

It is important to add that the said World Bank poverty assessment referred to in the above report, also covered Nigeria. The poor in Nigeria both in urban and rural areas perceived poverty as follows:⁵⁵

- i.) Inability of a man and his family to eat adequately and having a lack of money.
- ii.) Lack of housing: the situation of adults still living with parents owing to lack of ability to rent accommodation or inadequate living conditions.
- iii.) Living in debt or having to sell inherited assets to survive.
- iv.) Inability to access or afford medical facilities, electricity, water and other basic services.
- v.) Lack of security and peace was manifested in some instances in alcoholism and in domestic arguments, with frequent quarrelling widely cited as a characteristic of poverty.
- vi.) The urban poor were also seen to lack opportunity and have a bad quality of life. In the face of a limited asset base, the poor are unable to invest in and seek returns on their human capital and that of their children. Parents are illiterate and cannot access well-remunerated and secure employment. Children resort to begging and so miss out on education, while girls from poor households are perceived to be promiscuous.⁵⁶

In the same vein, in the report of the United Kingdom's Commission for Africa,⁵⁷ poverty was defined by the poor to include hunger, thirst, living without decent shelter, not being able to read, chronic sickness, not finding opportunities for someone and his children and about having little control over one's life. It was also revealed to mean more than the lack of material things, such as living under constant threat of personal

⁵⁴ See also Report on the World Social Situation 1997, op. cit. p. 63, which described the condition of people living in poverty as follows: '...Those living in a state of poverty are persons and families who by the nature of their circumstances must struggle continuously against malnutrition and deprivation. Poverty is a condition characterized by deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information.'

⁵⁵ See Deepa Narayan, Raj Patel et al. (2000), *Voices of the Poor-Can Anyone Hear Us?*, op. cit. p. 2.

⁵⁶ Ibid p. 16.

⁵⁷ The Commission for Africa was established in February 2004, by the then British Prime Minister, Tony Blair, with the aim of taking a fresh look at Africa's past and present and the international community's role in its development path. The 17-member Commission, with 9 from Africa were engaged and worked in individual capacities with a mandate to finalize its work by early 2005, and produce clear recommendations for the G8, EU and other wealthy countries as well as African countries. The Commission at the end of its task published a report *Our Common Interest*, on 11 March 2005. The principal objective of the Commission was that of generating new ideas and action for a strong and prosperous Africa, at <<http://www.commissionforafrica.org/english/about/story.html>> accessed 28 October 2007.

violence, being excluded from decision-making and from basic services the State ought to provide.⁵⁸

However, poverty exhibits the unique characteristic of being sometimes empirical, especially abject ones as revealed in the definition given by a poor man in Kenya in 1997 as follows:⁵⁹

'Don't ask me what poverty is because you have met it outside my house. Look at the house and count the number of holes. Look at my utensils and the clothes that I am wearing. Look at everything and write what you see. What you see is poverty.'

Another definition revealing the psychological trauma associated with poverty says:⁶⁰

'Poverty is humiliation, the sense of being dependent on them, and of being forced to accept rudeness, insults, and indifference when we seek help. - Latvia 1998'

From the above, it can be understood that although poverty is a form of multiple deprivation and cannot be defined purely by material deprivation alone, inadequate educational opportunities, unpleasant working conditions or powerlessness can be regarded as aspects of poverty. The multiple deprivation approach to poverty reveals that income can be a basic element in poverty issues. Other elements not directly linked to poverty have serious causal effects, meaning that solutions to poverty require a multi-dimensional approach.⁶¹

In the light of the experiences of the poor as revealed in the World Bank report, *Voices of the Poor* and many other reports, defining poverty in terms of wealth or income disparity alone will be to take an extreme relative view of poverty. It has been asserted that economic deprivation *per se* for instance, does not take account of the myriad social, cultural and political aspects of the phenomenon, and that in this sense, poverty is not only a deprivation of economic or material resources, but also a violation of

⁵⁸ See Report of the Commission for Africa (2005), *Our Common Interest*, p. 94. Available at <http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf> accessed 14 December 2006.

⁵⁹ See Deepa Narayan, Raj Patel, et al. (2000), *Voices of the Poor-Can Anyone Hear Us?*, op.cit. p. 26.

⁶⁰ Ibid p. 16.

⁶¹ See Haralambos and Holborn, op cit. p. 124; This view is corroborated by UN Dept. of Economic and Social Affairs, Division for Sustainable Development, when it stated that 'Poverty is a complex multidimensional problem with origins in both the national and international domains. No uniform solution can be found for global application. Rather, country-specific programmes to tackle poverty and international efforts supporting national efforts, as well as the parallel process of creating a supportive international environment, are crucial for a solution to this problem.' See UN Department of Economic and Social Affairs, Division for Sustainable Development, *Combating Poverty*, Agenda 21 Chapter 3. Available at <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm#sec3>> accessed 15 May 2007.

human dignity.⁶² Especially, as can be gleaned from the definitions of poverty above from Kenya and Latvia. The Vienna Declaration and Programme of Action declared for instance that existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights.⁶³

This work adopts the definition of poverty given by the United Nations Committee on Economic, Social and Cultural Rights, as stated above, on the basis of its human rights content which encompasses civil, cultural, economic, political and social rights, without any distinction.

1.4 POVERTY MEASUREMENT

Related to the problem of definition of the term ‘poverty’ is an associated difficulty of determining the ‘poverty threshold’ or ‘poverty line’⁶⁴ both globally and at national levels. The poverty line (although it depends on the concept employed) is generally understood to be one which assumes minimum levels of consumption below which survival is threatened.⁶⁵

Conventionally, extreme poverty is measured against the World Bank standard of living off US\$1 per day or less. But this rather quantitative measure of poverty often does not reflect many other aspects of poverty, some of which are crucial to a human rights analysis.⁶⁶ Most other reports have expressed the poverty line to be US\$1 a day and at the same time regard this as extreme or absolute poverty. For instance the United Nations Department for Economic and Social Information and Policy Analysis, stated that: ‘The international goal of halving the number of people living on less than US\$1 a

⁶² See Human Rights in Development, at <<http://www.unhchr.ch/development/poverty-02.html>> accessed 20 July 2007.

⁶³ See The World Conference on Human Rights held in Vienna, 14 – 25, June 1993, The Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993 in Article 14.

⁶⁴ Poverty lines are generally cut-off points demarcating the poor from the non-poor. The means for determining this can be monetary (e.g. a certain level of consumption) or non-monetary (e.g. a certain level of literacy). The two main ways of setting poverty lines are, relative and absolute. Relative poverty lines are often defined in respect of the ‘overall distribution of income or consumption in a country; for example, the poverty line could be set at 50 percent of the country’s mean income or consumption.’ Meanwhile absolute poverty lines are measured ‘in some absolute standard of what households should be able to count on in order to meet their basic needs. For monetary measures, these absolute poverty lines are often based on estimates of the cost of basic food needs (i.e. the cost of a nutritional basket considered minimal for the healthy survival of a typical family), to which a provision is added for non-food needs. For developing countries, considering the fact that large shares of the population survive with the bare minimum or less, it is often more relevant to rely on an absolute rather than a relative poverty line.’ See The World Bank, PovertyNet, Choosing and Estimating a Poverty Line, at <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20242879~isCURL:Y~menuPK:492130~pagePK:148956~piPK:216618~theSitePK:430367,00.html>> accessed 20 May 2008.

⁶⁵ See Report on the World Social Situation 1997 p. 64.

⁶⁶ See Human Rights in Development, <<http://www.unhchr.ch/development/poverty-02.html>> accessed 20 May 2007.

day by 2015 has become a universally recognized benchmark for evaluating development progress.’⁶⁷

The above report is also supported by the Millennium Development Goals which has as one of its targets the halving, by the year 2015, of the proportion of the world’s people whose income is less than one dollar a day,⁶⁸ among other goals, which is often interpreted as the development goal of eradicating absolute poverty, which presupposes that living on less than US\$1 per day is absolute poverty. This is deducible from proceeding words in the Declaration which state that ‘effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected.’⁶⁹

The report on the World Social Situation 2005 equally says that ‘...Table III.3 indicates that the proportion of the world’s population living in extreme or absolute poverty (surviving on less than US\$1 a day) declined noticeably between 1981 and 2001...’ In the said report, the poverty line is regarded as living on less than US\$2 per day.⁷⁰ Also in a 2004 work of the World Bank’ Development Research Group, living on \$1 per day was regarded as extreme poverty. The work says: ‘...This is the main poverty line we will focus on here, and we will refer to it as the “\$1 per day” line or “extreme poverty.”’⁷¹ In the report of the Independent Expert on human rights and extreme poverty, the World Bank definition of extreme poverty as those living on US\$1 or less per day was used.⁷²

The pertinent question here is the US\$1 a day test sufficient as a measure of poverty? The poverty threshold as mainly used by the World Bank and in many other reports on poverty has been criticized for not being ‘adequately anchored in any specification of the real requirements of human beings.’ It was argued that ‘income poverty is neither meaningful nor reliable.’⁷³ Sanjay Reddy and Thomas Pogge⁷⁴ have argued that the World Bank’s inadequate ‘approach to estimating the extent, distribution and trend of global income poverty may have led it to understate the extent of global income poverty and to infer without adequate justification that global income poverty has steeply declined in the recent period.’⁷⁵ They canvassed for ‘a new methodology of global

⁶⁷ See United Nations Department for Economic and Social Affairs, *The Inequality Predicament - Report on the World Social Situation, 2005* p. 134.

⁶⁸ See United Nations Millennium Declaration, para 19.

<<http://www.un.org/millennium/declaration/ares552e.htm>> accessed 14 August, 2007.

⁶⁹ Ibid at para 11.

⁷⁰ See Report on the World Social Situation, 2005 (A/60/117) p. 50.

⁷¹ See Shaohua Chen and Martin Ravallion (2004), p. 9.

⁷² See Report of Ms. A-M. Lizin, the Independent Expert on human rights and extreme poverty (E/CN.4/1999/48), Part B, para 49.

⁷³ See Sanjay G. Reddy and Thomas W. Pogge (2003), *How not to count the poor*, pp. 1 and 9
<<http://www.columbia.edu/~sr793/count.pdf>> accessed 17 August 2007.

⁷⁴ Ibid.

⁷⁵ For instance, the UN Department for Economic and Social Information and Policy Analysis indicated that ‘the number of people living in absolute poverty worldwide’ between 1990 and 2000 declined from 1.2 billion to 1.1 billion. It added that the proportion of the world’s population living on less than US\$1 a day decreased significantly between 1981 and 2001 (from 40 to 21 percent), the share of those

poverty assessment, focused directly on what is needed to achieve elementary human requirements,' which according to them 'is feasible and necessary.'⁷⁶

The inadequacy of poverty measurements has also been previously expressed by Mr. Leandro Despouy, Special Rapporteur on human rights and extreme poverty. He stated that apart from the fact that most reports do not use the same methods on the extent of poverty, the measurement that uses income as the sole parameter of poverty and extreme poverty is highly reductionist.⁷⁷ According to his final report, Mr. Leandro Despouy made reference to the World Bank's revising upwards by half a dollar a day as the threshold for measuring extreme poverty in 1985 to \$1 a day in 1993 and in the same year used a poverty line of \$2 for Latin America. At the time of his report, the Special Rapporteur stated that half a dollar a day was an extremely low threshold for measuring extreme poverty.⁷⁸

The Special Rapporteur in his report also referred to Julio Boltviink, former director of the UNDP Regional Poverty Eradication Programme, who in 1994 applied a "poverty line" of \$2 to the case of Mexico. He said the former UNDP director applied the \$2 a day poverty line as a consequence of empirical comparisons which the former director had performed, and stated that the former director concluded that such a poverty line could be interpreted solely as a malnutrition line, below which one would be suffering from caloric malnutrition (with all other needs unmet).⁷⁹ The former UNDP director was reported to have stated that 'the lower figure (\$1) had no meaning, since at that level of income a person would be technically dead.'⁸⁰

That was between 1994 and 1996, when the Special Rapporteur published his report. Why is the same poverty line of US\$1 a day is still being used over a decade later? Of course we cannot argue that prices of goods and services have remained at the same level in the last ten years anywhere in the world, especially for weak economy countries as we have in Africa. Apart from the fact that the poverty line of US\$1 a day does not take other deprivations of the poor into account, it cannot be regarded as an adequate poverty line. It has been said for instance that 'the \$1-a-day measurement of the poorest of the poor is not a very good standard of economic indicator for knowing the level of poverty because there are millions of people in Nigeria who earn up to \$3 per day and yet they are 100% poorer than millions of those who are on welfare in America and

living on less than US\$2 a day declining less dramatically (from 67 to 53 percent). In many African countries around a quarter of the population may be deemed consistently poor; however, up to an additional 60 percent move in and out of poverty (Economic Commission for Africa, 2003). See Report on the World Social Situation, 2005 pp. 51 and 55.

⁷⁶ See Sanjay G. Reddy and Thomas W. Pogge (2003), *op. cit.* pp. 1, 9 and 10.

⁷⁷ See Final Report of the Special Rapporteur on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/1996/13 paras 48 and 49.

⁷⁸ *Ibid* at para 50.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

Europe. The majority of Nigerians are said to be so poor that poverty no longer makes sense to them, because they are not worried.⁸¹

The \$1 per day poverty line has been criticized as it does 'not distinguish between the widely different experiences of the poor, which cannot be measured simply by looking at income.'⁸² For example, a Canadian philosopher, John Ralston Saul was reportedly to have said in a recently published book, "The End of Globalism", that "The ... fundamental question is whether such statistical propositions as the \$1-a-day-life reflect any reality that real people live in". He was reported to have said that "After all, people at \$3 a day could be living a life of pure despair in a savage slum of Lagos, a life far worse than that at \$1 a day in a stable slum like Klong Toey in Bangkok, where there is a societal structure."⁸³

It has been suggested that \$2 a day is a preferred poverty benchmark.⁸⁴

John Ralston Saul was said to have argued for instance that according to the World Bank report which says the number of people living on less than \$1 a day fell to 1.1 billion in 2001 from 1.5 billion in 1981(which Saul was said to have regarded as a much trumpeted trend being that it mostly reflects the economic rise of China and India.) The World Bank also stated in a recent report that the number living on less than \$2 a day increased to 2.7 billion in 2001 from 2.4 billion in 1981, and that "The 1.6 billion people in the middle, between the \$1 and \$2 a day poverty lines, are still very poor and remain vulnerable to economic slowdowns".⁸⁵

It was then argued that if the goal posts were moved and \$2 a day was the benchmark, it would be the preferred measure of some analysts.⁸⁶

The Special Rapporteur on human rights and extreme poverty has equally stated that the commonest quantitative tools used is evaluating poverty tend to underestimate the phenomena they claim to evaluate.⁸⁷ It follows that if the \$2 a day threshold is used, the number of people living in poverty will be more than currently estimated. Based on a poverty line of \$2 a day for instance, 126 million Nigerians out of the estimated population of 140 million would have been recently reported to be living in poverty.⁸⁸

⁸¹ See Ed Stoddard, *Measuring poverty: Does \$1-a-day standard make sense?* 13 September 2005 <http://nigeriantimes.blogspot.com/2005_09_01_archive.html> accessed 28 June 2007.

⁸² Ibid.

⁸³ See Orikinla Osinach, *The Poorest of the Poor in Africa*, Nigerian Times, 13 September 2005 at <http://nigeriantimes.blogspot.com/2005_09_01_archive.html> accessed 28 June, 2007.

⁸⁴ Ibid.

⁸⁵ See Report on the World Social Situation, 2005 pp. 51 and 55, for this report.

⁸⁶ See Orikinla Osinach, op cit.

⁸⁷ See Mr. Leandro Despouy's final report E/CN.4/Sub.2/1996/13 paras 48 and 49.

⁸⁸ Mr. Ismail Radwan, a Senior Economist with the World Bank, was reported to have indicated at a conference on microfinance organized by the Central Bank of Nigeria in Abuja on Wednesday 16th January 2008 that about 126 million out of the estimated 140 million people in Nigeria, i.e. 90 percent of the population lived on less than two dollars per day. See Atser Godwin, *126 million Nigerians live on less than \$2 a day*, The Punch Friday, 18 January, 2008 at <<http://odili.net/news/source/2008/jan/18/408.html>> accessed 20 January 2008.

This confirms the World Bank Report which indicates that 90.8 percent of the Nigerian population lives on US\$2 a day.⁸⁹ These reports confirm that poverty is widespread in Nigeria.

However, there is still the need to develop methods that will adequately measure poverty in a way that will reflect its many faces, and incorporate such access to social services, level of human development among others, apart from the dominant income or consumption/purchasing level patterns. This was the call made in the Copenhagen Declaration on Social Development, where it was even stated that each country should develop a precise definition and assessment of absolute poverty.⁹⁰ However, some of the problems described as militating against the collection of accurate data on the many specific characteristics of the poor, such as the sources of their income, family size, and access to education, health and sanitation services, as well as other attributes surrounding poverty, such as discrimination and vulnerability, are the reason why such process is said to be difficult, costly and time-consuming.⁹¹

It has also been expressed that all the manifestations of poverty cannot be summarized in a single index, and that comprehensive sets of data on specific characteristics of the poor are not available for all or even most countries, thus resulting in a broad conventional measure of poverty which can be applied to a large number of countries, which is 'an income or expenditure level which can sustain a minimum level of living'.⁹² It was therefore said that a common cross-country poverty line is a misnomer.⁹³ This is in spite of the fact that the working definition of poverty is interpreted to mean not only the consumption of food, clothing and shelter, but also access to education, health services, clean water and other basic necessities of life.⁹⁴ This then calls into question the adequacy of such a definition.

It has been rightly argued however that a global poverty line approach might be useful for determining the size of the world's poor population and cross-country comparisons, but the global poverty line is intrinsically limited, in that it reveals nothing about many conditions and circumstances associated with poverty and also suffers from the well-known deficiencies that arise from using the consumption of goods and services as a measure of welfare. In a suggestion that is in accord with that made in the Copenhagen Declaration on Social Development,⁹⁵ it was stated that in order to get a clearer picture of poverty in a particular country, a poverty line appropriate to the country should be

⁸⁹ See The World Bank (2000): *World Bank Development Report 2000/201: Attacking Poverty*, Part V. Table 4 Poverty, p. 1.

⁹⁰ See Copenhagen Declaration on Social Development op. cit. in paras 25 and 26 (d), which calls for development of methods to measure all forms of poverty and elaborating, at the national level, on the measurements, criteria and indicators for determining the extent and distribution of absolute poverty, respectively.

⁹¹ See Report on the World Social Situation 1997 p. 64.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Under para 26 (d) concerning the call for a precise definition and assessment of absolute poverty on a national basis.

established and a range of social indicators for the country broken down, when feasible into 'poor' and 'non-poor', should be taken into account.⁹⁶

During the fieldwork conducted on this research in Nigeria, between April and October, 2006 (as 'the fieldwork') almost all the people interviewed without exception stated that \$1 a day was an insufficient poverty line. According to them, the high price of goods and services, and the high exchange rate have added to make the Nigerian Naira of little value.⁹⁷ Some of the people interviewed claimed that the exchange rate equivalent of \$1 which was about N132 (Nigerian Naira) at the time of the fieldwork cannot adequately feed a young child in a day let alone an adult. Some of the people interviewed also contended that, apart from eating, ability of individuals to cater for shelter, health, water and other essential needs (like soap, body cream, toothpaste or chewing gum, clothes, etc.) for both themselves and their family are of crucial importance which have not been taken into consideration.

1.4.1 Conclusion

The point being made here is that the \$1 a day test is generally inadequate for measuring world poverty and that if the preferred \$2 a day benchmark is used, it will reveal that the rate of people living in poverty in the world is more than sometimes estimated.⁹⁸ The \$2 a day is the measurement commonly used.⁹⁹ Also, it will further be revealed that most Nigerians are indeed living in poverty. A very recent report which used the \$2 a day poverty line has thus indicated that over 90 percent of Nigerians, 126 million out of the estimated 140 million population are living in poverty.¹⁰⁰ This work uses the \$1 a day threshold which indicates that the majority of Nigerians are extremely poor.

2.1 GLOBAL RESPONSE TO THE CHALLENGE OF POVERTY

The issue of world poverty has gained increased international attention more than ever before which has culminated in various approaches to reduce or eliminate the scourge.

⁹⁶ See Report on the World Social Situation 1997 op. cit. p. 65.

⁹⁷ Between April and October 2006 when the fieldwork was conducted in Nigeria, 1 US Dollar = 133.375 Nigerian Naira while 1 Nigerian Naira (NGN) = 0.007498 US Dollar (USD) in April 2006 and 1 US Dollar = 131.512 Nigerian Naira while 1 Nigerian Naira (NGN) = 0.007604 US Dollar (USD) in October 2006 See Oanda.Com at <<http://www.oanda.com/convert/classic>> accessed 02 February 2008.

⁹⁸ See World Development Report 2000/2001: op. cit. p. 1. The report indicates at the start that of the world's 6 billion people, 2.8 billion live on less than \$2 a day and 1.2 billion on less than \$1 a day. Eight out of every 100 infants do not live to see their fifth birthday. Nine of every 100 boys and 14 of every 100 girls who reach school age do not attend school.

⁹⁹ Thomas Pogge referred to World Bank's poverty line as \$2/day and \$1/day. See Thomas W. Pogge (2002), *World Poverty and Human Rights*, Malden, USA, p. 2; David Bilchitz also referred to the international poverty line as USD2 per day. See David Bilchitz (2007), *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press Inc., New York p. 133.

¹⁰⁰ This was credited to Mr. Ismail Radwan, a Senior Economist with the World Bank, at a conference on microfinance organized by the Central Bank of Nigeria in Abuja on 17 January 2008. See Atser Godwin, op. cit.

Poverty eradication has been described in particular as a major human rights challenge of the 21st century.¹⁰¹ Poverty has been considered to have constituted a major stumbling block not only to development but also as a serious violation of human rights of people around the world.¹⁰² In their messages to commemorate the International human rights Day 10 December 2006, the United Nations Secretary-General and the United Nations Independent Experts joint statement stressed the challenge posed by poverty to human rights and that ‘fighting poverty is ‘a matter of obligation, not charity.’¹⁰³

The many depressing international reports on global poverty, some of which have been referred to above, paved the way for the new approaches to human rights and development to combat poverty.¹⁰⁴ The various new approaches designed and employed by the international community to combat global poverty now have human rights as the core of these, which formed the basis for the consideration of some of the approaches examined in this work. Some of these are the rights-based approaches to human development, human security, good governance and the main human rights approach,¹⁰⁵ as poverty reduction measures.

The capacity approach developed by Nobel Prize economist Amartya Sen, for instance has been used in finding solutions to the problem of poverty in the world, which also have some common elements with the human rights approach to extreme poverty. (These issues will later be discussed in detail in this work.) The earliest element of this approach appeared to be the right to development approach, which has characterized the activities of major United Nations agencies working on scientific, economic and social development.¹⁰⁶

One of the reasons for the rights-based approach to the scourge of poverty is that often, poverty interventions focus on the victim more than the system that created the conditions of victimization, so they do not remove the inherent deficits that create and perpetuate poverty but concentrate on deficiencies such as food and drugs shortages, the number of classrooms and classroom size, student teacher and patient doctor ratios,

¹⁰¹ See UNDP (2000), *Human Development Report 2000: Human Rights and Development*, New York, Oxford University Press, p. 8.

¹⁰² See Report on the World Social Situation 1997 op. cit. p. 64.

¹⁰³ See The UN Secretary-General’s message on International human rights day 10 Dec 2006, paras 1 & 2, at

<http://www.ohchr.org/english/events/day2006/docs/hrday_sg.doc> accessed 10 August 2007; Joint statement of United Nations 37 special procedure mandate holders, on the occasion of Human Rights Day 10 December 2006 at

<http://www.ohchr.org/english/events/day2006/docs/spec_proc_statement.doc> accessed 10 August 2007.

¹⁰⁴ See Paschal Miho and Karin Arts, “The Human Rights Deficit: Root cause and Efforts to Address it”, in Karin Arts and Paschal Miho (ed.) (2003), *Responding to the Human Rights Deficit: Essays in Honour of Bas de Gaay Fortman*, Kluwer Law International p. 2.

¹⁰⁵ See Office of the United Nations Human Commissioner for Human Rights, *Human Rights in Development- What is it all about?* <<http://www.unhchr.ch/development/e>> accessed 6 August 2007.

¹⁰⁶ Such as the United Nations Development Programme (UNDP), United Nations Educational, Scientific and Cultural Organization (UNESCO), UN Children’s Fund (UNICEF), UN World Food Programme, (WFP), UN Population Fund (UNFPA) and UN Environment Programme (UNEP).

equipment and so on. The concentration becomes how to fill these gaps, although temporarily within a particular project, once the projects wind up, the poor or their communities often go back to where they started. The interventions have been said not to address the structural causes of the deficits at global and national levels.¹⁰⁷

It seems to be realized now that to address poverty in a way that does not incorporate a human rights approach will take time to mature and have substantial effects. This was probably why at the 2005 World Summit of world leaders meeting which reviewed progress on Millennium Declarations, fresh commitments were made to fight poverty, address security - freedom from fear - and human rights - freedom to live in dignity,¹⁰⁸ as articulated by the UN Secretary-General in his statement to the Millennium Summit, 2000.¹⁰⁹

We shall now examine some of the approaches to addressing poverty.

2.2 Human development approach

2.2.1 Background

Prior to the adoption of the Declaration on the Right to Development in 1986, issues relating to rights and development have featured prominently in United Nations deliberations for more than fifty years.¹¹⁰ In UN General Assembly Resolution 1161 (XII) on balanced and integrated economic and social progress,¹¹¹ the General Assembly expressed the view that balanced and integrated economic and social development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and the observance of, and respect for, human rights and fundamental freedoms for all. This resolution was based on the report of the Economic and Social Council¹¹² and Council Resolution 633 H (XXIV) of 31 July 1957, on the world social situation¹¹³ and the General Assembly recommends that the Economic and Social Council, in cooperation with the specialized agencies, intensify efforts in the study and recommendation of measures to effect a balanced and integrated economic and social progress.¹¹⁴ The said resolution was one of the important early documents relating to the link between development and respect for human rights.

¹⁰⁷ See Paschal Mihiyo and Karin Arts (2003), op. cit. pp. 12-13.

¹⁰⁸ See GA A/RES/60/1. 2005.

¹⁰⁹ See We the People: The Secretary-General's Statement, where freedom from want and fear were articulated. <<http://www.un.org/millennium/sg/report/state.htm>> accessed 10 August 2007.

¹¹⁰ See Office of the United Nations Human Commissioner for Human Rights, Human Rights to Development. <<http://www.unhchr.ch/development/right.html>> accessed 5 August, 2007.

¹¹¹ See UN General Assembly Resolution 1161 (XII) of 26 November, 1957.

¹¹² Official Records of the General Assembly, Twelfth Session, supplement No. 3 (A/3613)

¹¹³ Para 1 (b) of the Council's resolution had called for the study of balanced economic and social development.

¹¹⁴ See Paras 2 and 3 of General Assembly Resolution 1161 (XII).

The Proclamation of Teheran, at the first International Conference on Human Rights held in Tehran in 1968 noted that ‘the widening gap between the economically developed and developing countries impedes the realization of human rights in the international community. Also, the failure of the Development Decade¹¹⁵ to reach its modest objectives makes it all the more imperative for every nation, according to its capacities, to make the maximum possible effort to close this gap.’ The Proclamation further noted that ‘The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.’¹¹⁶ The Teheran Conference was held to review the progress made in the twenty years since the adoption of the Universal Declaration of Human Rights and to formulate a programme for the future.

In 1969, the UN General Assembly in Resolution 2542 (XXIV), adopted the Declaration on Social Progress and Development, which proclaims the right to live in dignity and freedom and to enjoy fruits of social progress,¹¹⁷ promotion of human rights and social justice, requiring the immediate and final elimination of all forms of inequality, and the recognition and effective implementation of civil and cultural rights without any discrimination.¹¹⁸ The Declaration makes social progress and development the common concern of the international community, which shall supplement, by concerted international action, national efforts to raise the living standards of peoples.¹¹⁹ The Declaration also calls for the elimination of poverty, the assurance of a steady improvement in the levels of living and of a just and equitable distribution of income, provision for all, particularly persons in low-income groups and large families, adequate housing and community services, social services, etc.¹²⁰

The United Nations showed further concern for articulating the right to development, and in its Resolution 4 (XXXIII) of 21 February 1977, the United Nations Commission on Human Rights decided to pay special attention to the consideration of the obstacles hindering the full realization of those rights, particularly in developing countries, as well as of the actions taken at the national and international levels to secure the enjoyment of

¹¹⁵ The period 1960 to 1970, was regarded ‘as the first development decade, which brought about considerable changes in the development concepts. It began with the growth-by-industrialization concept but soon there were bitter disappointments. The industrial countries granted less development aid than expected. In 1962, instead of 0.7 % of the gross national product, only 0.5 % and, in 1976, even less, 0.3 %, was granted. The first UNCTAD conference showed that the industrial countries were not prepared to make trade concessions to the poor countries, and moreover, during that period, a deterioration in prices on the world market was ascertained for products from developing countries as compared with industrial products.’ See F. Kuhnlen, *Concepts for the Development of the Third World A Review of the Changing Thoughts between 1945 and 1985*, at <<http://www.professor-frithjof-kuhlen.de/publications/development-third-world/2.htm>> accessed 29 October 2007.

¹¹⁶ See Paragraphs 12 and 13, Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968) at <<http://www1.umn.edu/humanrts/instree/I2ptichr.htm>> accessed 5 August 2007.

¹¹⁷ See Article 1 Declaration on Social Progress and Development.

¹¹⁸ See Article 2 of the Declaration.

¹¹⁹ See Article 9 of the Declaration.

¹²⁰ Ibid See Article 10.

those rights.¹²¹ The Commission on Human Rights also recommended that the Economic and Social Council should invite the Secretary-General, in cooperation with UNESCO and the other competent specialized agencies, to undertake a study on the subject: "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace' among other rights."¹²²

The Secretary-General's study was considered by the Commission on Human Rights at its thirty-fifth session in 1979. In Resolution 4 (XXXV) of 2 March 1979, it recommended that the Secretary-General should be invited to follow up the study with a further study of the regional and national dimensions of the right to development as a human right, paying particular attention to the obstacles encountered by developing countries in their efforts to secure the enjoyment of that right. The Commission subsequently, by its Resolution 36 (XXXVII) of 11 March 1981, established a working group of 15 governmental experts to study the scope and contents of the right to development and the most effective means to ensure the realization, in all countries, of the economic, social and cultural rights enshrined in various international instruments, paying particular attention to the obstacles encountered by developing countries in their efforts to secure the enjoyment of human rights. It also requested the Working Group to submit a report with concrete proposals for implementation of the right to development and for a draft international instrument on this subject.¹²³

In the Independent Expert, Ms. Lizin's report of 11 September 1998 to the General Assembly on the mid-term evaluation of the Vienna Declaration and Programme of Action,¹²⁴ the United Nations High Commissioner for Human Rights proposed that the Second and Third Committees of the General Assembly should work jointly to implement the right to development by focusing on the elimination of poverty, with particular emphasis placed on basic security, which is necessary to enable individuals and families to enjoy fundamental rights and assume basic responsibilities.

The various resolutions, reports, the Declaration on Social Progress and Development and conference on human rights, the interface between development and human rights as revealed by the preponderance of these documents, set the pace for the later adoption of the right to development in 1998.

¹²¹ See Riyadh Aziz, *The Right to Development*, p. 3
<<http://daccessdds.un.org/doc/UNDOC/GEN/G93/122/68/PDF/G9312268.pdf?OpenElement>>
accessed 6 August 2007.

¹²² See Riyadh Aziz, *op. cit.* p. 3.

¹²³ See Office of the United Nations High Commissioner for Human Rights, *Right to Development*, *op. cit.*

¹²⁴ See A/53/372.

2.3 Declaration of the right to development

The UN General Assembly proclamation of the right to development in 1986¹²⁵ however signalled a major approach to mainstreaming rights in development. The main content of the Declaration on the Right to Development is contained in Article 1, which states that ‘the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.’ Article 2(1) further provides for the need for human persons to be the active participant and beneficiary of the right to development, as the human person is the central subject of development. Article 2(3) provides for the duty of States to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom, including the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.¹²⁶

Under the Declaration, States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development, and among others the duty to encourage the observance and realization of human rights.¹²⁷ Article 6(2) emphasizes the indivisibility and interdependence of all human rights and fundamental freedoms and that equal attention and urgent consideration to the implementation, promotion and protection of civil, political, economic, social and cultural rights, and in Article 6(3) enjoins States to take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

The provision of the Declaration having most significant and direct relevance to poverty reduction strategy is Article 8(1) which provides that States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. It also provides that effective measures should be undertaken to ensure that women have an active role in the development process and that appropriate economic and social reforms should be carried out with a view to eradicating all social injustices. This provision clearly incorporates a human rights approach to development, coupled with Article 8(2) which provides that States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights. These two provisions indicate that rights and development are mutually reinforcing and dependent on each other.

¹²⁵ See Declaration on Right to Development, adopted by UN General Assembly Resolution 41/128 of 4 December 1986 at <<http://www.unhchr.ch/html/menu3/b/74.htm>> accessed 5 August 2007.

¹²⁶ See Article 3(1).

¹²⁷ See Article 3(3).

The right to development is also rooted in the United Nations Charter (to promote social progress and better standards of life with larger freedom, to employ international machinery for the promotion of the economic and social advancement of all peoples¹²⁸ and Article 55 of the UN Charter,¹²⁹ the Universal Declaration on Human Rights¹³⁰ and the two International Human Rights Covenants.

In 1998, the Economic and Social Council, by its decision 1998/269, endorsed the recommendation contained in Commission on Human Rights Resolution 1998/72, to establish a dual mechanism to explore in greater depth ways of implementing the right to development: the open-ended working group and the Independent Expert on the right to development.¹³¹ The Working Group is mandated to monitor and review progress made in the promotion and implementation of the right to development as elaborated in the Declaration on the Right to Development, at the national and international levels.¹³² While the Independent Expert is mandated to present to the open-ended working group at each of its sessions a study on the current state of progress in the implementation of the right to development as a basis for a focused discussion, taking into account, *inter alia*, the deliberations and suggestions of the Working Group.

In subsequent resolutions, the Commission on Human Rights requested the independent expert to focus on specific topics and to prepare additional studies, such as country - specific studies relevant to the proposed operational model of his development compact or a study on the impact of international economic and financial issues on the enjoyment

¹²⁸ See Preamble of the United Nations Charter, which provides for the promotion of higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

¹²⁹ See United Nations Charter, Article 55.

¹³⁰ See the UDHR provisions on right of equality before the law without discrimination to equal protection of the law, Article 7; right of everyone to take part in the government of his country, directly or through freely chosen representatives, and right of equal access to public service in his country, Article 21(1) and (2); right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control, Article 25(1); and right of everyone to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized, Article 28.

¹³¹ See Office of the United Nations High Commissioner for Human Rights, *Right to Development*, op. cit.

¹³² By providing recommendations thereon and further analyzing obstacles to its full enjoyment, focusing each year on specific commitments in the Declaration. The Working Group is mandated to hold annual sessions. It considers operational aspects of the right to development and discusses the reports of the Independent Expert on progress in implementing the right to development. See Office of the United Nations High Commissioner for Human Rights, *Right to Development*, op. cit.

of human rights.¹³³ There have been different reports recently submitted by the Independent Expert on the implementation of the right to development.¹³⁴

Major conferences held since the adoption of the right to development have been inextricably linked with the issues of rights and development. At the second World Conference on Human Rights, held in Vienna in 1993, the issue of right to development was dealt with extensively. In the Vienna Declaration and Programme of Action adopted at the conference, democracy, development and respect for human rights and fundamental freedoms were brought out as interdependent and mutually reinforcing.¹³⁵

The 1993 World Conference on Human Rights also reaffirms the right to development as a universal and inalienable right and an integral part of fundamental human rights and that development facilitates human rights.¹³⁶ In Article 14 of the UN resolution in relation to the Vienna Declaration, it was recognized that the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights.¹³⁷ The Vienna Declaration and Programme of Action, emphasize the importance of the enjoyment of fundamental human rights by stating that, 'While development facilitated the enjoyment of all human rights, the lack of development could not be invoked to justify the abridgement of internationally recognized human rights'.¹³⁸

The Vienna World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.¹³⁹

¹³³ See Office of the United Nations High Commissioner for Human Rights, *Right to Development*, op. cit.

¹³⁴ See Report of the high-level task force on the implementation on the right to development for the consideration of the Working Group on the Right to Development A/HRC/4/WG/2/TF/2 of 13 February 2007; see Report of the Working Group on the Right to Development for the consideration of the Human Rights Council A/HRC/4/47; see Report of the High Commissioner for Human Rights on the right to development, A/HRC/4/55 submitted on 14 February 2007 at the Fourth session of the Human Rights Council.

¹³⁵ See World Conference on Human Rights Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, UN GA, A/CONF.157/23 12 July 1993 para; see also, Alois Mock, *A new departure - United Nations World Conference on Human Rights in Vienna, Austria*. Alois Mock, Austria's Minister of Foreign Affairs and Chairperson of the European Democratic Union, was president of the World Conference on Human Rights.

<http://findarticles.com/p/articles/mi_m1310/is_1994_March/ai_15630291> accessed 7 August 2007

¹³⁶ See Para 10 of the Vienna Declaration and Programme of Action, (A/CONF.157/24, 25 June 1993).

¹³⁷ See UN General Assembly Resolution A/CONF.157/23 of 12 July 1993 Article 14.

¹³⁸ See Part I, para 10.

¹³⁹ See para 25 of Vienna Programme of Action.

The UN General Assembly in Resolution 47/196 of 1993 declared 17 October to be observed every year as the International Day for the Eradication of Poverty which has been observed since 1993. The declaration was to promote awareness of the need to eradicate poverty and destitution in all countries, particularly in developing countries.¹⁴⁰

In 1993, the resolution establishing the Office and terms of reference of the High Commissioner for Human Rights, charged the High Commissioner with the duty of ensuring realization of the right to development.¹⁴¹ The International Conference on Population and Development (ICPD) held in Cairo from 5 to 13 September 1994 also has a profound bearing on development.¹⁴² The Programme of Action of the Cairo Conference builds upon the UN Conference on Environment and Development (1992), and the World Conference on Human Rights, Vienna (1993) among others and set a 20-year goal in four related areas.¹⁴³

There was also a World Summit for Social Development held in March 1995 in Copenhagen, where governments reached a new consensus on the need to put people at the centre of development. The Social Summit pledged to make the conquest of poverty, the goal of full employment and the fostering of social integration overriding objectives of development. There are ten commitments in the Declaration on the Social Summit,

¹⁴⁰ See UNBI Snet, <<http://www.un.org/depts/dhl/poverty/>> accessed 29 October 2007.

¹⁴¹ See Para 3(c) of UN General Assembly Resolution 48/141 of 20 December 1993, which provides that the High Commissioner for Human Rights shall 'recognize the importance of promoting a balanced and sustainable development for all people and of ensuring realization of the right to development, as established in the Declaration on the Right to Development.' See A/RES/48/1417 January 1994.

¹⁴² The Conference was convened under the auspices of the United Nations and was organized by a secretariat composed of the Population Division of the UN Department for Economic and Social Information and Policy Analysis and the United Nations Population Fund (UNFPA)) and also dwelled on the issue of development. The Programme of Action, adopted by acclamation on 13 September 1994, endorses a new strategy that emphasizes the integral linkages between population and development and focuses on meeting the needs of individual women and men, rather than on achieving demographic targets. See United Nations Population Fund (UNFPA), the International Conference on Population and Development (ICPD), at <<http://www.unfpa.org/icpd/icpd.htm>> accessed 6 August 2007. One of the greatest achievements of the Cairo Conference has been the recognition of the need to empower women, both as a highly important end in itself and as a key to improving the quality of life for everyone. The key to this new approach is empowering women and providing them with more choices through expanded access to education and health services, skill development and employment, and through their full involvement in policy and decision-making processes at all levels. See United Nations Population Fund (UNFPA), the International Conference on Population and Development (ICPD) <<http://www.unfpa.org/icpd/icpd.htm>> accessed 6 August 2007.

¹⁴³ These are: i) Universal primary education in all countries before the year 2015. ii) Reduction of infant and under-five mortality rates by one third or to 50 and 70 per 1,000 live births, respectively, whichever is less, by the year 2000. By 2005, countries with intermediate mortality levels should aim to achieve an infant mortality rate below 50 deaths per 1,000 live births and an under-five mortality rate below 60 deaths per 1,000 live births. By 2015, all countries should aim to achieve an infant mortality rate below 35 per 1,000 live births and an under-five mortality rate below 45 per 1,000, iii) Reduction in maternal mortality by one half of the 1990 levels by the year 2000 and a further one half by 2015. iv) Access to Reproductive and Sexual Health Services Including Family Planning. See United Nations Population Fund (UNFPA), the International Conference on Population and Development (ICPD), op. cit.

key among which is the eradication of absolute poverty.¹⁴⁴ The Programme of Action of the World Summit has five commitments; also key among them is the eradication of poverty.¹⁴⁵ Five years on, there was another meeting in Geneva in June 2000, to review what has been achieved, and for world leaders to commit themselves to new initiatives.¹⁴⁶

The Copenhagen Declaration and Programme of Action however provides the substantive framework for the current drive for eradicating poverty and for planning the efforts of the United Nations system in support of the first United Nations Decade for the Eradication of Poverty (1997-2006).¹⁴⁷

The Fourth World Conference on Women, held in Beijing in 1995, was aimed at advancing the goals of equality, development and peace for all women everywhere in the interest of all humanity, eradication of poverty based on sustained economic growth, social development, environmental protection and social justice, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development, and the promotion and protection of all human rights of women and girls.¹⁴⁸

Following the major conferences in Copenhagen and Beijing both of 1995 The UN General Assembly in A/RES/50/107 declared 1996 as the International Year for the Eradication of Poverty and proclaimed the first United Nations Decade for the Eradication of Poverty (1997-2006), urging all governments, the international community, including the United Nations system and all other actors in society to pursue seriously the objective of the eradication of poverty.

¹⁴⁴ The 10 Commitments in the Copenhagen Declaration on Social Development are: 1. Create an economic, political, social, cultural and legal environment that will enable people to achieve social development; 2. Eradicate absolute poverty by a target date to be set by each country 3. Support full employment as a basic policy goal; 4. Promote social integration based on the enhancement and protection of all human rights; 5. Achieve equality and equity between women and men; 6. Attain universal and equitable access to education and primary health care; 7. Accelerate the development of Africa and the least developed countries; 8. Ensure that structural adjustment programmes include social development goals; 9. Increase resources allocated to social development; 10. Strengthen cooperation for social development through the UN. See World Summit for Social Development, Copenhagen Declaration on Social Development Commitments, <<http://www.visionoffice.com/socdev/wssdco-4.htm>> accessed 21 August 2007; Commitment 2 of the Copenhagen Declaration (1995) World Summit for Social Development, A/CONF.166/9.

¹⁴⁵ These are: i. An Enabling Environment for Social Development, ii. Eradication of Poverty, iii. Expansion of Productive Employment and Reduction of Unemployment, iv. Social Integration v. Implementation and Follow-Up. See World Summit for Social Development, Programme of Action, <<http://www.visionoffice.com/socdev/wssdco-4.htm>> accessed 21 August 2007.

¹⁴⁶ See United Nations Department of Economic and Social Affairs, World Summit for Social Development, Copenhagen, 1995, *Overview*. <<http://www.un.org/esa/socdev/wssd/>> accessed 6 August 2007.

¹⁴⁷ See Report of the Independent Expert on human rights and extreme poverty, Part II, para 38.

¹⁴⁸ See Paras. 3, 8, 9 and 16 of Beijing Declaration, The Fourth World Conference on Women, held in Beijing in September 1995, (the year of the fiftieth anniversary of the founding of the United Nations); the 1995 Beijing Declaration -A/CONF.177/20.

In Resolution A/RES/55/2 of 18 September 2000,¹⁴⁹ the United Nations General Assembly adopted the United Nations Millennium Declaration, where the UN articulated the Millennium Development Goals (MDGs)¹⁵⁰ as the targets of the world in the 21st century towards tackling the problem of world poverty, development and the maintenance of peace in the world. The twenty-fourth special session of the General Assembly, held in 2000, called upon governments to put poverty eradication at the centre of economic and social development. It urged them to build consensus with all relevant actors on policies and strategies to reduce the proportion of people living in extreme poverty by one half by 2015.

The goals are a modification of a number of International Development Goals previously set by the UN in the 1990s. These are now being pursued by all countries of the world with the active support and cooperation of the United Nations and the international community. The MDGs were reaffirmed at the United Nations Millennium Summit in 2000, where 189 Heads of State and governments adopted the Millennium Declaration. The fact that the objective to eradicate poverty has been integrated into the Millennium Development Goals, has increased global awareness of this pressing issue and contributed to a concerted effort at the national and international levels to reduce poverty. The MDGs were set basically on the rights footing as most of the goals and targets are core human rights issues. The issue of extreme poverty has been addressed by the Independent Expert on human rights and extreme poverty, Ms. A-M Lizin, who have submitted two reports on the same (these reports are later referred to in this work). The right to education, health, gender equality, empowerment and sustainable environment are human rights issues covered by the international human rights law.

The way the development approach to poverty reduction lays emphasis on respect for human rights as a necessary component of that approach can further be seen in United Nations Development Programme's Human Development Report 2000 which dealt extensively with human rights in development as a means of reducing poverty. It is perhaps the first and the most detailed UNDP report that seriously highlighted the importance of a human rights approach to development by copiously relating the innumerable ways by which observance of human rights could significantly empower people to fight poverty and uplift development, and enhance sustainable human development. The report also cited copious examples of many grave human rights abuses around the world as inhibiting poverty reduction measures.¹⁵¹ The report also

¹⁴⁹ This was sequel to the Millennium Summit of the UN held from 6 to 8 September 2000, at which the Secretary-General, Kofi-Anan, in his report to the UN General Assembly titled *'We the peoples: the role of the United Nations in the 21st century'* (A/54/2000) catalogued the huge problem of poverty and other challenges facing the world.

¹⁵⁰ The goals are to: Eradicate extreme poverty and hunger, Achieve universal primary education, Promote gender equality and empower women, Reduce child mortality, Improve maternal health, Combat HIV/AIDS, malaria and other diseases, Ensure environmental sustainability and Develop a global partnership for development. See UN General Assembly Resolution A/RES/55/2 and Millennium Development Goals, <<http://www.un.org/millenniumgoals/>> accessed 25 October 2007.

¹⁵¹ See UNDP, *Human Development Report 2000: Human Rights and Development*, New York, Oxford University Press, in particular the foreword, which summarizes the content of the report, especially pages iii and iv.

indicated and emphasized that human rights and development are mutually reinforcing and sharing common visions of securing the freedom, well-being and dignity of all people everywhere.¹⁵²

Since the adoption of the right to development, all developmental discussions and work of the United Agencies have revolved around and emphasized human rights. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa in 2001 emphasized the fact that poverty, underdevelopment, marginalization, social exclusion and economic disparities are closely associated with racism, racial discrimination, xenophobia and related intolerance, and contribute to the persistence of racist attitudes and practices which in turn generate more poverty. The Conference further affirmed the solemn commitment of all States to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance.¹⁵³

The Copenhagen World Summit for Social Development also held in March 1995 was particularly an important link between development and human rights as a result of the numerous commitments made by governments, one of which was to create a legal environment that will enable people to achieve social development, and to this end, government at the national level is to:

*'Provide a stable legal framework, in accordance with our Constitutions, laws and procedures, and consistent with international law and obligations, which includes and promotes equality and equity between women and men, full respect for all human rights and fundamental freedoms and the rule of law, access to justice, the elimination of all forms of discrimination, transparent and accountable governance and administration and the encouragement of partnership with free and representative organizations of civil society.'*¹⁵⁴

The draft Plan of Implementation for the World Summit on Sustainable Development recognizes poverty eradication as the greatest global challenge facing the world today and an indispensable requirement for sustainable development, now widely accepted that – on the one hand - poverty should not be seen only as a lack of income, but also as a deprivation of human rights, and – on the other hand – that unless the problems of poverty are addressed, there can be no sustainable development.¹⁵⁵

¹⁵² Ibid p. 1.

¹⁵³ See Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban, 31 August - 8 September 2001, esp. paras 11, 19 and 78.
<[http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/cb95dc2388024cc7c1256b4f005369cb/\\$FILE/N0221543.doc](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/cb95dc2388024cc7c1256b4f005369cb/$FILE/N0221543.doc)> accessed 6 August 2007.

¹⁵⁴ See Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, Part C, para 29 Commitment 1(a).

¹⁵⁵ See the Office of the High Commissioner for Human Rights, *Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water*, A Background Paper on the World Summit on Sustainable Development Johannesburg, 26 August – 4 September 2002 p. 2.

2.3.1 Human rights content

The core elements of the link between human rights and development are those that perceive balanced and integrated economic and social development necessary for better standards of living, respect for human rights, that lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development, right to live in dignity and freedom and to enjoy the fruits of social progress, emphasis on access to basic resources, education, health services, food, housing, employment and the fair distribution of income, the recognition and effective implementation of civil and cultural rights without any discrimination, making people the centre of development, recognition that extreme poverty and social exclusion constitute a violation of human dignity, making eradication of poverty, full employment and the fostering of social integration overriding objectives of development.

With the above, human rights became firmly entrenched in development and as an important poverty reduction measure, as development and respect for human rights were brought out as interdependent and mutually reinforcing, in that development facilitates human rights. There have been efforts also, to explore the potential contribution of a human rights perspective to the development of policies and programmes that strengthen the sustainability of poor people's assets and livelihood security. A human rights framework it was noted provides a useful entry point for the analysis of asymmetries in power and the institutions which reinforce these unequal relations. Study has shown that a rights and livelihoods perspective provides a more concrete understanding of social sustainability and sustainable development.¹⁵⁶

The right approach to development has given more understanding of the many faces of poverty and helped to ensure that development is not pursued at the expense of human rights.¹⁵⁷

2.4 The human security approach

In 1982 the Independent Commission on Disarmament and Security Issues, under the Chairmanship of Olof Palme - popularly called Palme's Commission in its report - issued a warning on the world security situation when it stated:¹⁵⁸

¹⁵⁶ See Caroline Moser and Andy Norton with Tim Conway et al. (2001), *To Claim Our Rights, livelihood security, human rights and sustainable development*, Odi, London, U.K. p. vi.

¹⁵⁷ See Human Rights in Development, op. cit.

¹⁵⁸ See Palme Commission, *Common Security*, Pan Books, London, 1982 p. 172 cited in Bertrand G. Ramcharan (2002), *Human Rights and Human Security*, Martinus Nijhoff Publishers, Kluwer Law International p. 246. The Palme Commission offered a "blueprint for survival" in a world of growing military expenditure, with an expanding arms trade, alarming national races to improve both weapons of mass destruction and conventional weapons, new risks of the proliferation of weapons of mass destruction, new pressures for the 'weaponization' of outer space, the growing lethality of conventional wars, the escalating economic and social costs of armament, and expanding public awareness of the environmental consequences both of nuclear war and the production of nuclear weapons. See Jayantha

“The present condition of the world economy threatens the security of every country. The Commission believes that just as countries cannot achieve security at each other’s expense, so too they cannot achieve security through strength alone. Common security requires that people live in dignity and peace, that they have enough to eat and able to find work and live in a world without poverty and destitution.”

As a result of the widespread and pervasive insecurities stemming from diversities such as conflict, poverty, infectious diseases, and human rights violations threatening the survival and dignity of millions of people around the world,¹⁵⁹ the then UN Secretary-General Kofi Annan in response to this challenge called upon the world leaders at the United Nations Millennium Summit, 2000 to advance the twin goals of "freedom from want" and "freedom from fear".¹⁶⁰ As a result of which an independent Commission on Human Security (CHS) (Co-Chaired by Sadako Ogata, former UN High Commissioner for Refugees and Amartya Sen, Nobel Laureate) was established in 2001. The goals of the Commission are: i. to promote public understanding, engagement and support of human security and its underlying imperatives; ii. to develop the concept of human security as an operational tool for policy formulation and implementation; and iii to propose a concrete programme of action to address critical and pervasive threats to human security.

After two years of deliberation, the Commission submitted its final report, entitled *Human Security Now*, to the UN Secretary-General in May 2003. Two broad areas form the fulcrum of the Commission’s research. One area deals with human insecurities resulting from conflict and violence, and the other with the links between human security and development. The project on the developmental aspects of human security focuses on insecurities related to poverty, health, education, gender disparities and other types of inequality.¹⁶¹

At the conclusion of its activities on 31 May 2003 and submission of its report, the Advisory Board on Human Security (ABHS) was established based on the recommendation of the Commission, to among others promote human security, carry forward the recommendations of the Commission¹⁶² and advise the Secretary-General on the management of the United Nations Trust Fund for Human Security (UNTFHS).¹⁶³

Dhanapala, *A Future Arms Control and Disarmament Agenda*, presented at 1999 Olof Palme Memorial Lecture, Stockholm International Peace Research Institute, Stockholm, Sweden 30 September 1999 <<http://disarmament.un.org/speech/30Sept1999.htm>> accessed 3 February 2008.

¹⁵⁹ See Commission on Human Security <<http://www.humansecurity-chs.org/about/Establishment.html>> accessed 5 September 2007.

¹⁶⁰ See Kofi A. Annan (2000), *We the Peoples: The Role of the United Nations in the 21st Century*, United Nations New York, chapters i, ii and iii.

¹⁶¹ See Commission on Human Security, op. cit.

¹⁶² Ibid.

¹⁶³ In March 1999, the Government of Japan and the United Nations Secretariat launched the United Nations Trust Fund for Human Security (UNTFHS), the UNTFHS has been funded solely by the Government of Japan, with total contributions (including interest) of approximately US\$303 million as of 31 March 2006. The majority of funding was directed towards developmental concerns including key thematic areas such as health, education, agriculture and small scale infrastructure development.

The Human Security Unit (HSU) was established in May 2004 in the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), with the overall objective of integrating human security in all UN activities. The HSU combines the management of the United Nations Trust Fund for Human Security (UNTFHS) with the dissemination and promotion activities of the Advisory Board on Human Security (ABHS). The HSU thus plays a pivotal role in translating the concept of human security into concrete activities and highlighting the added value of the human security approach as proposed by the Commission on Human Security (CHS).¹⁶⁴

There is now growing emphasis on human security as this complements State security, enhances human rights and strengthens human development. Human security seeks to protect people against a broad range of threats to individuals and communities and, further, to empower them to act on their own behalf. In this sense, human security thus brings together the human elements of security, of rights and of development.¹⁶⁵

According to the Commission on Human Security, human security means protecting fundamental freedoms - freedoms that are the essence of life. It means protecting people from severe and widespread threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity. The Commission views the vital core of life as a set of elementary rights and freedoms that people enjoy.¹⁶⁶

The strategy of human security approach to poverty reduction is summed up in the words of the then Secretary-General of the United Nations, Kofi Annan as follows:¹⁶⁷

"Human security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear and the freedom of future generations to inherit a healthy natural environment -- these are the interrelated building blocks of human -- and therefore national -- security."

Human security is also concerned with deprivation: from extreme impoverishment, pollution, ill health, illiteracy and other maladies. For example, catastrophic accidents and illness were said to rank among the primary worries of the poor, which combined

See Human Security Unit, Overview and Objectives, OCHA New York 2006 p. 1 (pdf). At <http://globalism.rmit.edu.au/files/SOI/UN_HSU_Overview.pdf> accessed on 5 September 2007.

¹⁶⁴ See Human Security Unit, <<http://ochaonline.un.org/HumanitarianIssues/HumanSecurity/HumanSecurityUnit/tabid/1292/Default.aspx>> accessed 5 September 2007.

¹⁶⁵ See Commission on Human Security, *Human Security Now*, New York 2003 p. 2.

¹⁶⁶ Ibid at p. 4.

¹⁶⁷ See Annan, Kofi, "Secretary-General Salutes International Workshop on Human Security in Mongolia." Two-Day Session in Ulaanbaatar, May 8-10, 2000. Press Release SG/SM/7382.

effects on human lives were said to have caused more than 22 million preventable deaths in 2001.¹⁶⁸ Educational deprivations are regarded as being particularly serious for human security. It is viewed that without education, men and especially women are disadvantaged as productive workers, as fathers and mothers, as citizens capable of social change.¹⁶⁹ Social security is deemed essential to human security because without social protection, personal injury or economic collapse can catapult families into penury and desperation. All such losses have been regarded as having effect on people's power to fend for themselves.¹⁷⁰

As a result of the core values of human security which reinforces human rights, the first which is respect for basic rights and freedoms, others such as combating deprivation from poverty, pollution, ill health, illiteracy and other maladies, human security has been viewed as a class of human rights.¹⁷¹ For this reason, human rights and human security are regarded as mutually reinforcing, and that as human security helps identify the rights at stake in a particular situation, human rights help answer the question: How should human security be promoted?¹⁷²

Human security is also said to complement human development by deliberately focusing on "downside risks". It recognizes the conditions that menace survival, the continuation of daily life and the dignity of human beings (for example, genocide, a financial crisis, a violent conflict, chronic destitution, a terrorist attack, HIV/AIDS, underinvestment in health care, water shortages or pollution from a distant land). In this sense human security is said to be protective in its approach by identifying and preparing for events that could have severe and widespread consequences. For which reason, human security is said to be deliberately protective, thus enhancing the freedoms that people enjoy.¹⁷³

Human security is geared towards poverty reduction as human security is said to contract when people's livelihoods are deeply compromised. Thus human security equally perceives basic income and resources, the freedoms to enjoy basic health, basic education, shelter, physical safety, and access to clean water and clean air are vitally important.¹⁷⁴ In this way a human security approach to poverty reduction is complementary to that of human rights.

2.4.1 Human rights content

From the above, human security is concerned essentially with ensuring that people live in dignity, have enough to eat, have employment, focuses on insecurity relating to poverty, health, education, gender disparities, and other types of inequality, social

¹⁶⁸ See Commission on Human Security, *Human Security Now*, op. cit. p. 6.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid at p. 9.

¹⁷² Ibid at p. 10.

¹⁷³ Ibid.

¹⁷⁴ Ibid p. 73.

protection, and seeks to protect people against a broad range of threats to individuals and communities. Human security deems that the foregoing affect people's ability to fend for themselves.

As a result of the core values of human security, which are respect for basic rights and combating deprivation from poverty, pollution, ill health, illiteracy and other maladies, human security has been viewed as enhancing human rights and protecting fundamental freedoms by giving people the building blocks of survival, livelihood and dignity. In this way, human rights and human security are regarded as mutually reinforcing, by empowering people to act on their own behalf and ensuring that each individual has opportunities and choices to fulfil his or her own potential. These are also what human rights seek to ensure and protect.

2.5 Good governance approach

The good governance approach is deemed essential to poverty reduction because of the need to have a conducive environment where the cardinal purpose of governance is the protection of human rights, observance of the rule of law and the running of public institutions on the basis of accountability and devoid of corruption. This approach is borne of the view that strategies to fight poverty need to be comprehensive and address the entire range of factors that prevent poor people from escaping from the clutches of poverty.¹⁷⁵

In Resolution 2000/64 the Commission on Human Rights recognizes the importance of a conducive environment, at both the national and the international levels, for the full enjoyment of all human rights, and also that transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a *sine qua non* for the promotion of human rights.¹⁷⁶

Governance has been described as the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights, in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance has been said to be the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights, and that the key question is: are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security.¹⁷⁷ It is believed that human rights protection and respect for the rule of law will have a sure footing at the national level if there is

¹⁷⁵ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November, 2006 p. iii.

¹⁷⁶ See Para 1 of the resolution.

¹⁷⁷ See OHCHR, *Human Rights in Development*, at <<http://www.unhchr.ch/development/governance-01.html>> accessed 3 September 2007.

transparent, responsible, accountable, participatory and responsive governance and the national institutions are able to respond more effectively to the will of the people and that international institutions of governance will be in a better position to respond to the needs of the developing world once national institutions meet the test of good governance.¹⁷⁸

In September 2000, the UN Consultative Committee on Programme and Operational Questions (CCPOQ) approved, on behalf of the Administrative Committee on Coordination (ACC), the ACC Matrix of Governance, setting out policy measures, core elements and areas of programmatic collaboration for the United Nations system. The policy measures are democracy and participation, equity, environmental protection and management, human rights, the rule of law, public administration and service delivery, transparency and accountability, security, peace-building and conflict management, informed citizenry, and electronic governance (e-governance). The core elements and areas of programmatic collaboration draw on human rights concepts such as participation, accountability, non-discrimination, empowerment and express-linkage to human rights.¹⁷⁹ These have been used as the basis of a good governance benchmark in the world - under the World Bank's Worldwide Governance Indicators (WGI) project.¹⁸⁰

In the UN Secretary-General, Kofi Annan's report to the UN General Assembly in September 2003¹⁸¹ on the implementation of the United Nations Millennium Declaration, he emphasized good governance and democracy as key for effective realization of human rights and in meeting the millennium goals. Good governance for instance, is believed will keep a check on corruption and abuse of office through accountability.¹⁸²

The Independent Expert on human rights and extreme poverty, also in her second report for instance, stated that democracy and civil and political rights, when effectively exercised, will allow the poor to assert their economic and social rights, express their needs and aspirations, and transform them into mechanisms of democratic power. She further stated that corruption undermines democracy and stressed the need to implement social policies of democratization designed to secure respect for human rights in countries riven by corruption.¹⁸³

Thus, this approach hinges on the premise that if good governance¹⁸⁴ is firmly enthroned, with the observance of human rights, rule of law, democracy and

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ See World Bank, WGI 2006: Worldwide Governance Indicators covering the period 1996-2005 at <http://info.worldbank.org/governance/kkz2005/sc_chart.asp> accessed 20 March 2007.

¹⁸¹ See A/58/323 of 2 September 2003.

¹⁸² Ibid.

¹⁸³ See E/CN.4/2000/52 of 25 February 2000, the second report of Ms. A-M. Lizin, the Independent Expert on human rights and extreme poverty, para 92 p. 28.

¹⁸⁴ For example, good governance will ensure employment policies and jobs programmes for the very poor, with a jobs creation programmes component that takes into account extremely poor persons. 'In

participation, accountability (which will keep a check on corruption and abuse of office, which creates or exacerbates poverty), it will create inclusion and also empower the poor to lift themselves out of poverty.

At the inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, it was noted that poverty is a multidimensional problem and that by focusing only on reducing income poverty, we fail to address its root causes. Over the past years, there has been the realization of the importance of governance, in particular the debilitating effect of corruption, on the effectiveness of poverty eradication efforts.¹⁸⁵

2.5.1 Human rights content

The good governance approach to poverty reduction is premised on the basis that if there is transparent, responsible, accountable, participatory and responsive governance, respect for human rights and observance of the rule of law, conduct of public affairs and management of public resources in a way that is practically free of abuse and corruption, then a conducive environment will be enthroned whereby the human rights of the people can be fully and effectively realized. Also in good governance, access to right to health, adequate housing, sufficient food, quality education, fair justice and public administration and service delivery are guaranteed. Democracy and accountability ensures for instance that corruption and abuse of office are effectively controlled and the poor will be able to assert their economic and social rights; this will in turn create inclusion and empower the poor to lift themselves out of poverty.

Corruption for instance undermines democracy and good governance will keep a check on the effect of corruption and the effectiveness of poverty eradication efforts. Good governance therefore is essential to the enjoyment and protection of all human rights, which will then empower the people.

2.6 The capacity approach

The capacity approach as developed mainly by Amartya Sen and Martha Nussbaum, has gained popularity and respect in development ethics over the last decade.¹⁸⁶ Also, the approach has motivated the approach in relation to questions of global justice and ethics. Nussbaum, the U.S. philosopher for instance has used the capability approach to provide a basis for central constitutional principles that citizens can demand from

addition, national legislation should promote policies for occupational integration or re-integration which target their measures more specifically on the poorest population groups: women, single mothers, adolescent migrants, members of minorities, indigenous peoples, the disabled, persons displaced within their own country, the elderly, and the homeless.’ See E/CN.4/2000/52, para 99 p. 30.

¹⁸⁵ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November, 2006 p. iii.

¹⁸⁶ See Emma Dowling, “The Capability Approach and Human”, in Rhona K.M. Smith and Christien van den Anker (eds) (2005), *The Essentials of Human Rights*, Hodder Arnold, London p. 31.

government.¹⁸⁷ Sen places emphasis on people's capability to achieve valuable functioning that make up their lives, and on people's freedom to promote objectives they have reason to value.¹⁸⁸ According to Sen, functionings include a variety of elements such as rudimentary ones from being well-nourished, avoiding escapable morbidity and premature mortality, etc., to other sophisticated achievements, such as having self-respect and ability to participate in the affairs of the community.¹⁸⁹

The capacity approach to poverty views poverty as the deprivation of some minimum satisfaction of basic capacities. This in turn revolves around a person's capacity to achieve functioning in terms of well-being and freedom to pursue well-being. This approach measures the well-being of people according to the quality of the life they live. The capacity to achieve basic functioning is deemed crucial to one's freedom.¹⁹⁰ The freedom of choice, for example to avoid hunger is linked and is conducive to one's quality of life. Thus acting freely, having choices and not being constrained to live a particular type of life are seen as crucial to this approach.¹⁹¹

The capacity approach equally emphasizes the importance of society to respond to capacity failures (living without food, being held down by diseases, etc.) through public policy in order to boost people's 'liberty to choose as they desire' being the basic freedom that human beings value.¹⁹² The capacity approach's fundamental link between development and freedom, emphasizes that poverty must be seen as the deprivation of basic capabilities rather than merely a lowness of income. Sen's vision of poverty as capability deprivation is thus consistent with the UNDP's human development approach of focusing on a process of enlarging people's choices by ensuring a corresponding expansion of their capabilities.¹⁹³

The well-being element of the capacity approach is very crucial to matters like poverty alleviation, social security, elimination of gross economic inequality and the pursuit of social justice generally.¹⁹⁴ The well-being of human beings has been of importance in assessing social inequality and public policy in society, as disparities in people's well-being can be contrasted against social injustice and inequality prevailing among the different classes of people in a given society that might be obstructive to the freedom to achieve well-being.¹⁹⁵ In this sense, the capacity approach is well related to the good governance approach as indicated above¹⁹⁶ and the rights-based approach as contrasted

¹⁸⁷ Ibid pp. 31-32.

¹⁸⁸ See Amartya Sen (1992), *Inequality Reexamined*, Oxford University Press, Oxford p. xi.

¹⁸⁹ See Sen, op. cit. p. 5.

¹⁹⁰ Ibid p. 39.

¹⁹¹ Ibid p. 51.

¹⁹² Ibid p. 69.

¹⁹³ See Human Rights in Development <<http://www.unhchr.ch/development/poverty-01.html>> accessed 12 August 2007.

¹⁹⁴ See Sen, op. cit. p. 71.

¹⁹⁵ Ibid p. 72.

¹⁹⁶ The true test of "good" governance has been said to be the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights, and are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality

below. Nussbaum has pushed the argument further that human functioning is not only about achieving the life one wants to live but must also entail a notion of human dignity.¹⁹⁷

The capacity approach has been useful not only in terms of identification of poverty as an acknowledging deprivation, but this approach is particularly useful in policy recommendation by prioritizing those that are truly deprived in a given society, and the need for policy recommendation to meet the capacity failure of those truly deprived.¹⁹⁸ Sen's capacity approach has presented poverty in terms of capability failure rather than in terms of the failure to meet the 'basic needs' of specified commodities. Poverty is thus conceived not as a matter of low well-being, but of the inability to pursue well-being precisely because of the lack of economic means.¹⁹⁹ This conception of poverty indicates that not all capacity failures will constitute poverty.

The approach of seeing poverty as capability failure, linked to various underlying concerns, such as guaranteeing minimal individual well-being or providing minimal individual freedoms, can in turn be related to more foundational demands of good-or-right-social arrangements in society.²⁰⁰ The reorientation from an income-centred to a capability-centred view according to Sen, gives us a better understanding of what is involved in the challenge of poverty.²⁰¹ The broadening of the concept of poverty by the capacity approach, interpreted as the failure of a range of capacities has also assisted in shifting focus to the multidimensional concept of poverty.²⁰²

Sen's capacity approach has contributed immensely to focusing international attention on the significance of fundamental human freedoms and human rights for development theory and practice, as against dominant approaches in the past that have often characterized development in terms of Gross Domestic Product (GDP)²⁰³ per capita, food security in terms of food availability and poverty in terms of income deprivation.

education, fair justice and personal security. See OHCHR, Human Rights in Development <<http://www.unhcr.ch/development/governance-01.html>> accessed 3 September 2007; the Independent Expert emphasized that combating extreme poverty and implementing the rights of the poorest of the poor involves designing and funding a range of basic social services which reach out to the very poor and ensuring respect for human rights, in particular within the judicial system and by the police. See E/CN.4/1999/48 report of the Independent Expert on human rights and extreme poverty, para 125 p. 32.

¹⁹⁷ See Emma Dowling, *op. cit.* p. 32.

¹⁹⁸ See Sen, *op. cit.* 107.

¹⁹⁹ *Ibid* pp 109-110.

²⁰⁰ *Ibid* p. 151.

²⁰¹ *Ibid.*

²⁰² See OHCHR, *op. cit.* pp. 7-8.

²⁰³ Gross Domestic Product (GDP) is the most commonly used indicator of national income. It attempts to measure the sum of incomes received by the various wealth creating sectors of the economy: manufacturing, agriculture, service industries. See X, Understanding GDP and GNP, BBC News, 12 February 2003. <<http://news.bbc.co.uk/1/hi/business/88618.stm>> accessed 10 May 2008.

In contrast, Sen's work has highlighted the central idea that, in the final analysis, market outcomes and government actions should be judged in terms of valuable human ends.²⁰⁴ Sen's capability concept noted that poverty impedes the freedom to live one's life to the full because of education, good health and the like. A comparison of the outcomes sought by the human rights world with those of the poverty reduction community will reveal a convergence of the two, as poverty reduction outcomes have converged with the ends that human rights seek to obtain, and that the development and human rights communities are increasingly motivated by a shared set of norms and values.²⁰⁵ This approach translates that lack of capacity to meet basic human needs into poverty.

Sen and Nussbaum however agree that the language of human rights should be the tool with which to make moral claims that are established through the capability method, which has been interpreted to mean that we have a right to what we ought to have the capability to do.²⁰⁶

2.6.1 Human rights content

The basis of the capability approach is its promotion of people's capability to achieve valuable functioning, such as being well-nourished, avoiding escapable morbidity and premature mortality, etc., and the ability to participate in the affairs of the community. This approach measures people's well-being according to the quality of life they live and that society should respond through public policy to capacity failures, for instance where people cannot self-provide in order to prop up people's capacity to live a life that they desire.

The capacity approach's emphasis that deprivations of basic capabilities, such as the capacity to enjoy one's freedom and participate in community life are congruent with expanding the frontiers of poverty, beyond income poverty. The well-being notion of human dignity and distributive justice components of the capacity approach are fundamentally crucial to poverty alleviation. This approach notes that poverty impedes the freedom to live one's life to the full in the absence of education, good health, shelter, etc.

This approach acknowledges that the language of human rights should be employed to demand claims established through the capacity method. As a result there is sufficient nexus between this approach and the human rights approach, and the common grounds are examined below.

The capability approach has however been criticized on the ground that it is difficult to put into operation. It was argued that in spite of the fact that Sen published his work "Commodities and Capabilities" since 1985, there has been limited number of empirical

²⁰⁴ See *Economic Theory, Freedom and Human Rights: The Work of Amartya Sen* 2001, Odi Briefings, U.K. available at <http://www.odi.org.uk/PPPG/publications/briefings/odi_briefings/sen.html> accessed 20 May 2007.

²⁰⁵ See Gobind Nankani, John Page, and Lindsay Judge, op. cit. pp. 2 and 7.

²⁰⁶ See Emma Dowling, op. cit. p. 32.

applications of this approach, based on the fact that is difficult to assess and value functionings.²⁰⁷ Robeyns has posited for instance that ‘the capability approach will surely not be the easiest framework for well-being evaluation and analysis...’²⁰⁸

2.7 Human rights approach to poverty

2.7.1 Background

Poverty as a human rights and social justice issue only recently gained increased recognition. Poverty is not in itself mentioned in human rights instruments, but is covered by a gamut of general related rights.²⁰⁹ ‘In spite of five decades of concerted international effort, poverty eradication remains an elusive global objective.’²¹⁰

Some of the valuable lessons that the international community was said to have learnt from the failure of previous efforts to combat poverty is the recent global acceptance that poverty is not only about income, but is about the denial of human rights.²¹¹

The human rights approach to poverty has also been said to be accentuated by development failures to combat the problem of global poverty.²¹²

These realizations have placed importance on human rights, including the realization of the right to development and promotion of a rights-based approach as a prerequisite for effectively combating poverty. The emphasis on human rights as a means of combating poverty is evidenced in the Millennium Declaration, the Copenhagen Declaration, the Vienna Declaration and the work of the General Assembly (Resolution 46/121 on human rights and extreme poverty).²¹³

The UN Commission on Human Rights for example has been considering the relationship between human rights and poverty since 1990, when it requested the Sub-Commission on the Promotion and Protection of Human Rights, in Resolution 1990/15, to study the issue. In response, the Sub-Commission appointed Mr. Leandro Despouy as

²⁰⁷ See Ingrid Robeyns (2000), “An unworkable idea or a promising alternative? Sen’s capability approach re-examined”, p. 26 cited in A/HRC/5/3 31 May 2007- Third Report of the independent expert on the question of human rights and extreme poverty, Arjun Segupta p. 8 para 14 note 9.

²⁰⁸ See Ingrid Robeyns (2000), *An unworkable idea or a promising alternative? Sen’s capability approach re-examined*, p. 29.

<<http://mora.rente.nhh.no/projects/EqualityExchange/Portals/0/articles/Robeyns1.PDF>> accessed 13 November 2008.

²⁰⁹ See the following: - United Nations Charter, the Universal Declaration on Human Rights, Articles 22, 23, 25, 26 and 28., International Covenant on Economic, Social and Cultural Rights, Articles 2, 3, 6, 7, 9, 10, 11, 12, and 13., International Covenant on Civil and Political Rights, Articles 24 and 26., Convention on the Rights of the Child, Articles 2, 3, 4, 6, 24, 27, 28 and 32., Convention on the Elimination of All Forms of Racial Discrimination, Articles 2 and 5., Convention on the Elimination of All Forms of Discrimination Against Women, Articles 2, 7, and 10-14.

²¹⁰ See Human Rights in Development <<http://www.unhchr.ch/development/poverty-01.html>> accessed 12 August 2007.

²¹¹ Ibid.

²¹² See Paschal Mihiyo and Karin Arts, op. cit. p. 2.

²¹³ See Human Rights in Development <<http://www.unhchr.ch/development/poverty-01.html>> accessed 12 August 2007.

Special Rapporteur, who submitted two interim reports²¹⁴ on Human rights and income distribution, in line with his mandate of giving an overall view of extreme poverty from the human rights standpoint, encouraging a genuine awareness of the seriousness of the phenomenon, to make it better known and, to foster more suitable means to stamp it out.

In his final report²¹⁵ which dealt comprehensively with the issue of extreme poverty and human rights, the Special Rapporteur examined several fundamental rights and how they interact in the experience of people living in extreme poverty. With the analysis of what it is like to live in extreme poverty and its impact on human rights in general, the Special Rapporteur concludes that extreme poverty involves the denial, not of a single right or a given category of rights, but of human rights as a whole. The way the various rights as analyzed are interwoven gave credence to interrelatedness of the rights, which the Special Rapporteur found that life in poverty is a violation not only of economic and social rights, as is generally assumed from an economic standpoint, but also, and to an equal degree, of civil, political and cultural rights, and of the right to development.²¹⁶

The UN General Assembly in Resolution A/RES/46/121 of 17 December 1991 on Human Rights and extreme poverty, among other items, affirms that extreme poverty and exclusion from society constitute a violation of human dignity and that urgent national and international measures are therefore required to eliminate them.²¹⁷ The UN General Assembly in the same resolution also stresses the need for an in-depth and complete study of the nature of the phenomenon of extreme poverty which affects mankind.²¹⁸ The UN General Assembly²¹⁹ requests States, the specialized agencies and United Nations bodies and other international organizations, including intergovernmental organizations, to give the necessary attention to this problem.²²⁰

The Commission on Human Rights also in Resolution 1998/25 recalled that the eradication of widespread poverty, including its most persistent forms, and the full enjoyment of economic, social and cultural rights and civil and political rights remained interrelated goals, and deeply concerned that extreme poverty continued to spread throughout the world, regardless of economic, social or cultural situations, and that its extent and manifestations were particularly severe in developing countries, decided to appoint, for a period of two years, an independent expert on the question of human

²¹⁴ See E/CN.4/Sub.2/1994/19 and E/CN.4/Sub.2/1995/15.

²¹⁵ See E/CN.4/Sub.2/1996/13 of 28 June 1996.

²¹⁶ See paras 175 and 176.

²¹⁷ See A/RES/46/121 of 17 December 1991 para 1.

²¹⁸ Ibid para 2.

²¹⁹ As the UNGA has in its Resolution 45/199 of 21 December 1990 (and other resolutions relating to poverty), in which it proclaimed the Fourth United Nations Development Decade, one of the main characteristics of which is the search for a significant reduction in extreme poverty and a shared responsibility of all countries.

²²⁰ See A/RES/46/121 of 17 December 1991 para 5.

rights and extreme poverty. Consequently, Ms. A.-M. Lizin was appointed as an independent expert on the question of human rights and extreme poverty.²²¹

In Ms. Lizin's first report submitted in 1999, poverty was pinpointed as the principal cause of human rights violations in the world.²²² The fact that poverty incapacitates people from assuming not only their duties as individuals, but also their collective duties as citizens, parents, workers and electors was also recognized in the report.²²³ The Independent Expert emphasized that combating extreme poverty and implementing the rights of the poorest of the poor involves designing and funding a range of basic social services which reach out to the very poor and ensure respect for human rights, in particular within the judicial system and by the police.²²⁴

In her second and final report in 2000, the Independent Expert on human rights and extreme poverty, Ms. Lizin, among other matters emphasized the universal and multidimensional nature of extreme poverty. The final report also highlights the activities of the various development actors in combating extreme poverty. She stresses the fact that the State bears the primary responsibility for fighting against extreme poverty.²²⁵

²²¹ The mandate of the Independent Expert are (a) To evaluate the relationship between the promotion and protection of human rights and extreme poverty, including through the evaluation of measures taken at the national and international levels to promote the full enjoyment of human rights by persons living in extreme poverty; (b) To take into account in particular the obstacles encountered and progress made by women living in extreme poverty as regards the enjoyment of their fundamental rights; (c) To make recommendations and, as appropriate, proposals in the sphere of technical assistance; (d) To report on these activities to the Commission on Human Rights at its fifty-fifth and fifty-sixth sessions and to make those reports available to the Commission for Social Development and the Commission on the Status of Women, as appropriate, for their sessions during the same years; (e) To contribute to the General Assembly's evaluation in the year 2000 of the World Summit for Social Development by making his or her final report and conclusions available to the preparatory committee for the special session of the General Assembly devoted to that evaluation; and (f) To make suggestions to the Commission on Human Rights at its fifty-fifth session on the main points of a possible draft declaration on human rights and extreme poverty so that the Commission can consider the possibility of initiating at the fifty-first session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities the drafting by that body of a text for examination by the Commission and possible adoption by the General Assembly, and to take into account in that regard, *inter alia*, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Vienna Declaration and Programme of Action, the Copenhagen Declaration and Programme of Action of the World Summit for Social Development, the Agenda for Development and the final report of Mr. Leandro Despouy (E/CN.4/Sub.2/1996/13). See Report of the Independent Expert on human rights and extreme poverty, <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/f1b5b392c0004e3480256736003790ee?OpenDocument>> accessed 20 August 2007.

²²² See E/CN.4/1999/48 of 29 January 1999 report of the Independent Expert on human rights and extreme poverty, p. 1 para 115.

²²³ See E/CN.4/1999/48 para 9.

²²⁴ See E/CN.4/1999/48, p. 32 para 125.

²²⁵ See E/CN.4/2000/52 of 25 February 2000, the second report of the Independent Expert on human rights and extreme poverty, p. 3.

Also, recently in 2001, the Office of the High Commissioner for Human Rights (OHCHR) hosted an expert seminar at the Palais Wilson in Geneva, to consider a declaration on human rights and poverty. The seminar, convened pursuant to the Commission on Human Rights Resolution 2000/12 titled 'Human Rights and Extreme Poverty', examined the link between poverty and human rights, and considered the need for a text reflecting this link as well as related conceptual, normative and operational issues.²²⁶ The Commission on Human Rights Resolution 2001/31 requests the Sub-Commission on the Promotion and Protection of Human Rights to consider the need to develop guiding principles on the implementation of existing human rights norms and standards in the context of the fight against extreme poverty and to report to the Commission on Human Rights.

After Ms. A.Z. Lizin (Belgium) who held the mandate of the Independent Expert on the question of human rights and extreme poverty from April 1998 - July 2004, the Commission on Human Rights at its sixtieth session extended this mandate and Mr. Arjun Sengupta (India) was appointed as the new mandate holder.²²⁷ Mr. Sengupta who held that mandate from August 2004 - April 2008 submitted a total of three reports in respect of his mandate.²²⁸ Sengupta was requested by the resolution reconfirming his mandate to "pay special attention to the concrete experiences of involvement of people living in extreme poverty in the political decision-making and social processes" and "to continue to focus on the various aspects of the link between human rights and extreme poverty".²²⁹

In his first report to the Commission on Human Rights, the Independent Expert, building on previous approaches and consolidating them, made a number of definite proposals/ recommendations geared towards a more effective poverty eradication strategy and the realization of human rights. Importantly, he adopted a working definition of poverty as 'a composite of income poverty, human development poverty and social exclusion' and regarded extreme poverty as 'an extreme deprivation, in terms of some consensual definitions of severity of deprivation, especially when all these elements of deprivation coexist'.²³⁰ In other words, extreme or chronic poverty according to the Independent Expert is the extreme form of these three different dimensions of poverty. Put in another way according to the Independent Expert, 'extreme poverty can be regarded as a union of sets of people who are extremely income

²²⁶ See Human Rights in Development – 'Poverty, A Human Rights Response to Poverty'. <<http://www.unhcr.ch/development/poverty.03.html>> accessed 12 May 2007; The Committee on Economic, Social and Cultural Rights, in its statement on "Poverty and the International Covenant, on Economic, Social and Cultural Rights" captured the fact that poverty results from violations of human rights when it stated as follows: 'While statistics do not provide a complete understanding of poverty, these shocking figures signify massive and systemic breaches of the Universal Declaration of Human Rights and the two International Covenants, as well as of the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child and other international human rights instruments.' See Bertrand G. Ramcharan, op. cit. p. 262.

²²⁷ See Commission on Human Rights Resolution 2004/23.

²²⁸ See E/CN.4/2005/49 of 11 February 2005; E/CN.4/2006/43 of 2 March 2006 and A/HRC/5/3 of 31 May 2007.

²²⁹ See Commission on Human Rights Resolution 2005/16.

²³⁰ See E/CN.4/2005/49 para 18 p. 8.

poor, extremely human development poor and extremely socially excluded’²³¹ and he explores how this definition can be linked to human rights.

The advantage of adopting this definition according to the Independent Expert, is that such ‘a definition would enable the development of both targeted and integrated policies for each component of this approach’.²³² He also proposed to the Human Rights Commission, the making of a resolution or a declaration, as essential ‘to characterize poverty as a violation or denial of human rights, with the corresponding obligations of both realizing human rights and eradicating poverty.’²³³

The Independent Expert further proposed that at the national level, actions should ‘aim at fulfilling civil, political, economic, social and cultural rights to eradicate poverty and social exclusion’ and that poverty reduction strategies should be rights-based, whereas at the international plane, he recommended the establishment of a mechanism aimed at coordinating development cooperation activities of different governments and agencies.²³⁴ Key among his proposals as regards the role of the international financial institutions, are the recommendations for the setting up of a financing facility of callable funds, to which all countries on the basis of commitment will contribute 0.7 per cent of their GDP. The said fund will be managed by the World Bank and the IMF and he proposed that this should only be made available when poverty reduction strategy had been implemented in accordance with human rights standards.²³⁵ He also recommended the creation of a special window by the Bank and the Fund for financing plans by developing countries in order to enable them to expand employment opportunities for the poor, the marginal and vulnerable in the unorganized sector.²³⁶

The working definition of poverty as put forward by the Independent Expert is a very useful one, as it captures in a comprehensive manner all the different dimensions and definitions of poverty previously preferred in economics, social development and human rights works on poverty. Among these are basic security, capability deprivation and social exclusion, some of which have been examined in this work. The importance of the inclusion of social exclusion in the said definition is the provision of a window of opportunity of appreciating deprivation resulting from social exclusion, which may be distinct from deprivation resulting from income or human development.²³⁷ This will therefore facilitate the addressing of all these components of poverty in a more holistic manner, by serving as a basis for policy formulation and legal reforms. The Independent Expert’s recommendation for international cooperation by the creation of a fund aimed towards creating employment and the creation of an independent body to monitor each strategy,²³⁸ are vital proposals which will enhance poverty reduction and realization of the rights of the extreme poor.

²³¹ See A/HRC/5/3 of 31 May 2007 para 8 p. 7.

²³² See E/CN.4/2005/49 of 11 February 2005 p. 2.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ See E/CN.4/2005/49 para 53(g) p. 18.

²³⁶ Ibid at p. 19.

²³⁷ See E/CN.4/2006/43 paras 15 and 16 p. 9.

²³⁸ See E/CN.4/2005/49 of 11 February 2005 p. 2.

In his second report,²³⁹ the Independent Expert further explores the link between human rights and extreme poverty and demonstrates the distinct added value of looking at extreme poverty in terms of a violation or denial of human rights. The Independent Expert among others, provides a detailed explanation of the added value of viewing extreme poverty as a deprivation of human rights, as having the potential of putting the eradication of extreme poverty at the heart of policy objectives and making it possible to appeal to “legal obligations” since poverty can be identified with the deprivation of human rights recognized in international human rights instruments.²⁴⁰ He buttresses this by positing that poverty must be viewed as the denial of rights that have already been recognized in international human rights law, in order to invoke the applicability of obligations that are legally binding on the duty bearers.²⁴¹

The Independent Expert also stresses the unique advantage of focusing on extreme poverty, which is that of reducing the number of those to be caught by poverty reduction programmes, in a particular country to a manageable proportion in order to be able to prioritize this number. This will enable the making of the removal of conditions of extreme poverty as a core obligation of governments, which must be addressed as human rights objectives (by the fulfilment of the minimum level of some of the rights recognized in the international covenants).²⁴²

Based on his findings the Independent Expert makes a very important recommendation to the Commission on Human Rights among others, that ‘extreme poverty must be regarded as a denial of basic human rights, and all States, either directly or in cooperation with each other, must urgently take steps to eradicate extreme poverty from the face of the earth, as a “core” obligation to be carried out with immediate effect’,²⁴³ with a view to making the international community accept the eradication of extreme poverty as a human rights obligation.²⁴⁴

The Independent Expert in his third report on the question of extreme poverty and human rights²⁴⁵ further consolidates his two earlier reports in 2005 and 2006 referred to above. In it he includes his mission report on extreme poverty in the United States and the observations of the group of experts,²⁴⁶ which met in Geneva at a workshop on 23

²³⁹ See E/CN.4/2006/43 of 2 March 2006.

²⁴⁰ Ibid at p. 2.

²⁴¹ Ibid para 49 at p. 15.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ See E/CN.4/2006/43 para 70 p. 21.

²⁴⁵ See A/HRC/5/3 of 31 May 2007.

²⁴⁶ The experts namely are: Professor Baard Andreassen, Norwegian Centre for Human Rights; Professor Dan Banik, University of Oslo; Dr. Jose Bengoa, Member of the UN Sub-Commission for the Promotion and the Protection of Human Rights; Ms. Marily Gutierrez, International ATD Fourth World Movement; Professor Ravi Kanbur, Cornell University; Mr. Tom McCarthy, World Organization against Torture; Mr. Rajeev Malhotra, OHCHR; Mrs. Ellen Mouravieff-Apostal, International Federation of Social Workers; Mr. Michael Mutzner, Franciscans International; Dr. Ides Nicaise, University of Leuven; Dr. Siddiq Osmani, University of Ulster, UK; Professor Thomas Pogge, Columbia University; Professor Sanjay Reddy, Barnard College, Columbia University; Mr. Ibrahim Salama, Chairperson of the Working Group on the Right to Development, OHCHR; Professor Peter Townsend, London School of Economics; Mr.

and 24 February 2007 to consider the different aspects of the approach of the Independent Expert on human rights and extreme poverty.

In this third report, the Independent Expert further explores the link between human rights and extreme poverty by building on the international consensus of the multidimensionality of poverty and analyzes the different characteristics of the conditions of extreme poverty,²⁴⁷ linking these to the conditions of deprivation of human rights in order to facilitate the acceptance by the international community that the eradication of extreme poverty could be viewed as a human rights entitlement. He also examines the core characteristics of poverty as earlier indicated, in order to bring out the essential added value of viewing extreme poverty in terms of violation or denial of human rights,²⁴⁸ as well as providing grounds for the monitoring of improvement or deterioration of conditions, and the identification of policies to remove the specific conditions of extreme poverty and to establish indicators to measure progress or failure of the process of eradication.²⁴⁹

The Independent Expert equally examined some of the policy experiences of different countries, especially in Africa, Asia and Europe, on poverty reduction measures with a view to identifying ways by which the implementation of those policies could be improved within a human rights framework.²⁵⁰ The Independent Expert in this third and final report properly prepares the foundation for how a human rights-based approach can be useful to theoretical consideration ‘of developing consensus on the characteristics of extreme poverty and to the practical application of policies for the eradication of extreme poverty.’²⁵¹

After the expiration of the mandate of Sengupta, Ms. Madalena Sepúlveda Carmona (Chile), was appointed in his place as the current Independent Expert on the question of human rights and extreme poverty by the Human Rights Council in its resolution 8/11, at the seventh session of the Council. Under the Independent Expert’s mandate which took effect from 1 May 2008 and will last for a period of three years, she was requested by the resolution appointing her to further examine the relationship between the enjoyment of human rights and extreme poverty.

Sepúlveda Carmona was also invited to ‘identify alternative approaches to the removal of all obstacles, including institutional ones’ at all levels and to make recommendations on how those living in extreme poverty can effectively participate towards ‘the full enjoyment of their human rights, paying particular attention to the situation and empowerment of women, children and vulnerable groups, including persons living with disability living in extreme poverty’. The resolution further requested the Independent Expert to make contributions to the different international efforts relating to the

Xavier Verzat, International ATD Fourth World Movement; Dr. Arjun Sengupta, Independent Expert, OHCHR; and Mr. Jens Schutz, Secretariat OHCHR. See A/HRC/5/3 para 2 p. 4 note 1.

²⁴⁷ Namely income poverty, human development poverty and social exclusion.

²⁴⁸ See A/HRC/5/3 p. 2.

²⁴⁹ Ibid para 4 p. 5.

²⁵⁰ Ibid para 5 p. 5.

²⁵¹ See A/HRC/5/3 para 55 p. 24.

elimination of poverty towards the full enjoyment of human rights for all people living in extreme poverty and to make ‘recommendations that could contribute to the realization of the Millennium Development Goals, and in particular of goal 1, which consists in the halving by 2015 the proportion of people whose income is less than 1 dollar a day’, among others.²⁵²

By virtue of her mandate, the Independent Expert is required to make reports annually to the Human Rights Council and to the General Assembly.²⁵³ Consequentially, the Independent Expert submitted an interim on her mandate in August 2008.²⁵⁴ The interim report reinforces previous reports of the Special Rapporteur and Independent Experts on the subject and emphasizes the crucial need for any initiative meant to address the situation of those living in poverty from a human rights perspective, must be guided by the principles of equality and non-discrimination, participation, transparency, and accountability²⁵⁵ which are the core of the conceptual framework of the human rights approach to poverty reduction (as will be examined shortly in this work).

The Independent Expert among other things, indicated her projections to identify and share examples of good practices in the reduction and eradication of extreme poverty that take human rights principles and norms into account, and based on this formulated a set of recommendations that will provide guidance as to how these principles can be best incorporated into public policies and other relevant initiatives.²⁵⁶ The Independent Expert also intends to examine the impact of extreme poverty on women, children and persons with disabilities and raise awareness for the consideration of human rights dimensions for any poverty eradication policy or intervention.²⁵⁷

The Independent Expert in her interim report set out a plan of action, in particular the examination of the lack of meaningful participation of people living in poverty, the impact of public policies on people living in extreme poverty and the lack of awareness of poverty as a human rights issue.²⁵⁸ She also mapped out the policy issue she intends to address in 2008-2009, which is the human rights approach to cash transfer programmes.²⁵⁹

The above background paves the way for alternative approaches to improve the effective enjoyment of human rights and fundamental freedoms, including the now direct human rights-based approach in poverty reduction strategies. The recent reports of

²⁵² See the details of this mandate in the Human Rights Council Resolution 8/11 para 2(a) – (k).

²⁵³ See Resolution 8/11 para 4.

²⁵⁴ See A/63/274 of 13 August 2008.

²⁵⁵ See A/63/274 p. 2.

²⁵⁶ See A/63/274 paras 19 and 60 pp.10 and 17.

²⁵⁷ Ibid para 54 p.16.

²⁵⁸ See A/63/274 para 34 p. 12; para 53, p. 15 and para 46 p.14.

²⁵⁹ These programmes provide ‘direct financial support targeted to poor or extremely poor households. These programmes consist of cash transfers that are provided to households that commit to certain targets in terms of education, health or nutrition. Increasingly perceived as an effective tool for poverty eradication, these programmes have been implemented in all regions of the world by Governments with the support of international entities.’ See A/63/274 Para 78 p. 21.

the Independent Experts further consolidate and reinforce the human rights-based approach to poverty reduction, in order to make the intervention of governments justiciable²⁶⁰ and to enable people to claim their rights by enforcement procedures through the legal system to ensure accountability of policy makers.²⁶¹ However, it is not to be interpreted that all solutions to poverty reduction/eradication can be premised on a human rights-based approach or that this approach is to serve as an alternative to other approaches. But, the advantage of a human rights-based approach is that it reinforces other efforts and provides mutual strengthening.²⁶²

2.7.2 CONCEPTUAL BASIS OF HUMAN RIGHTS APPROACH TO POVERTY

The human rights approach to poverty reduction strategies²⁶³ hinges on many factors. First is the emerging recognition that poverty constitutes a denial or non-fulfilment of human rights, and second that existence of widespread poverty inhibits the full and effective enjoyment of human rights.²⁶⁴ This recognition has expanded the construction of poverty beyond the deprivation caused by economic constraints or the lack of command over economic resources.²⁶⁵

Although, the human rights approach to poverty does not remove the factor of economic constraints from poverty,²⁶⁶ the approach is however predicated on the basis that promoting human rights could alleviate poverty which led to a human rights approach to poverty reduction being increasingly recognized internationally and is gradually being implemented. The human rights approach to poverty reduction links poverty reduction to questions of obligation, rather than welfare or charity.²⁶⁷ The obligation imposed by the human rights approach to poverty reduction can be traced to the UN Charter, UDHR, and binding norms and values set out in the international law of human rights.²⁶⁸

In the context of the explicit recognition of the national and international human rights normative framework, treaty ratification represents “country ownership” of the relevant provisions and, second, a ratified treaty is legally binding on all branches of government. Government therefore ought to conform to treaty obligations it owes to individuals and groups within its jurisdiction.²⁶⁹ It is believed that the ‘internationally

²⁶⁰ See A/HRC/5/3 para 20 p.11.

²⁶¹ See A/63/274 para 25 p. 11.

²⁶² See A/63/274 para 26 p. 11.

²⁶³ The term poverty reduction strategies as used here is not the same as poverty reduction strategy papers (PRSP) used by international financial institutions, notably the World Bank and International Monetary Fund (IMF), which refers to a national document that is expected to provide a comprehensive analysis of poverty.

²⁶⁴ See The Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993 in Article 14

²⁶⁵ See OHCHR, Human Rights and Poverty Reduction: A Conceptual Framework, United Nations, New York and Geneva, 2004 p. 4.

²⁶⁶ Ibid at p. 5.

²⁶⁷ Ibid at p. 4.

²⁶⁸ Ibid at pp. III and 1.

²⁶⁹ Ibid at pp. 14 – 15.

accepted human rights standards can be operationally directed towards promoting and protecting the human rights of people living in poverty.’²⁷⁰

In 2001, the Chair of the United Nations Committee on Economic, Social and Cultural Rights, requested the Office of the High Commissioner for Human Rights to develop guidelines for the integration of human rights into poverty reduction strategies. Consequently the Office of High Commissioner mandated three experts – Professors Paul Hunt, Manfred Nowak and Siddiq Osmani – to prepare draft guidelines, and in carrying out this mandate they were to consult with national officials, civil society and international development agencies, including the World Bank. The experts produced the Draft Guidelines on a human rights approach to poverty reduction strategies which was published in 2002.²⁷¹

The guidelines are deemed compelling in the context of poverty reduction in that the norms and values enshrined in it have the potential to empower the poor. The Guidelines are 18 in all, and consist of first, the process of formulating poverty reduction strategies in the human rights approach, with emphasis on five main areas: (1) identification of the poor, (2) recognition of the relevant normative national and international human rights framework, (3) equality and non-discrimination, (4) progressive realization of human rights, and (5) participation and empowerment.

Under the guidelines nine rights were advocated as important to be addressed in poverty reduction strategies in the human rights approach (at the national level), and following the numbering in the preceding paragraph which are: (6) right to adequate food, (7) right to health, (8) right to education, (9) right to decent work, (10) right to adequate housing, (11) right to personal security, (12) right to appear in public without shame, (13) right of equal access to justice, and (14) political right and freedom.

At the international level there are the following guidelines (15) right to international assistance and cooperation, (16) principles of monitoring and accountability, (17) monitoring and accountability of States, and (18) monitoring and accountability of global actors.²⁷²

The five main areas where the Guidelines emphasized the formulation poverty reduction strategies in the human rights approach to poverty strategies are hereby examined as follows:

2.7.1.1 Empowerment of the poor

²⁷⁰ See The Office of the High Commissioner for Human Rights, Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water, A Background Paper on the World Summit on Sustainable Development Johannesburg, 26 August – 4 September, 2002, pp. 4-6
<<http://www.unhchr.ch/development/bp-summit.pdf>> accessed 7 August 2007.

²⁷¹ See Draft Guidelines on a human rights approach to poverty reduction strategies
<<http://www.unhchr.ch/development/povertyfinal.html>> accessed 12 August 2007.

²⁷² See Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies
<<http://www.unhchr.ch/development/povertyfinal.html>> accessed 12 August 2007.

A human rights approach for instance has been seen as a key element of empowering the poor to act on their own behalf. Powerlessness has been identified as a fundamental problem of poor people as indicated in the comprehensive study by the World Bank on poverty.²⁷³ In the *Voices of the Poor*, published in three volumes,²⁷⁴ the publication echoes the voice of the poor as often feeling utterly powerless, from accessing basic services to social ill-being and exclusion, powerlessness and being trapped in a web of linked deprivations, to personal incapability, etc.²⁷⁵

In the human rights approach to poverty reduction, empowerment of the poor is now an important element. The approach is principally about empowering people based on the introduction of the concept of rights. The concept of rights creates obligations deriving from the international human rights law by reference to the duties to respect, protect and fulfil. The duty to respect requires the duty bearer not to breach directly or indirectly the enjoyment of any human right. The duty to protect requires the duty bearer to take measures that prevent third parties from abusing the right. The duty to fulfil requires the duty bearer to adopt appropriate legislative, administrative and other measures towards the full realization of human rights. Poverty reduction in this sense becomes a legal obligation rather than charity or a moral obligation. This existence of legal entitlements of the poor and legal obligations of others serves as an important bridge of empowerment.²⁷⁶

In combating the problem of powerlessness, human rights empower individuals and communities by granting them entitlements that give rise to legal obligations on others. It is therefore essential that the poor are able to access entitlements and enjoy their rights.²⁷⁷

In his message on the occasion of the International human rights day in 2006,²⁷⁸ the UN Secretary-General stated on human rights relevance to empowering the poor as follows:

‘Since human rights norms emphasize individual empowerment, a rights-based approach can help empower and enable the poor. It can help citizens at all levels to win the knowledge and status they need to play a real part in decisions that affect their lives. It can focus attention on sound and sustainable processes that offer hope for long-term

²⁷³ See Narayan, Deepa with Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch-Schulte (2000), *Voices of the Poor: Can Anyone Hear Us?*, New York, N.Y.: Published for the World Bank, Oxford University Press, Chapter 3; Narayan, Deepa, Robert Chambers, Meera Kaul Shah and Patti Petesch (2000), *Voices of the Poor: Crying Out for Change*, New York, N.Y.: Published for the World Bank, Oxford University Press, Chapters 7 and 10; see Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, New York, N.Y.: Published for the World Bank, Oxford University Press, Chapter 1.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Office of the UN High Commissioner for Human Rights
<<http://www.unhchr.ch/development/povertyfinal.html>> accessed 12 February 2007.

²⁷⁷ See OHCHR, op. cit. p. 14.

²⁷⁸ See The UN Secretary-General’s message on International human rights day 10 Dec 2006
<http://www.ohchr.org/english/events/day2006/docs/hrday_sg.doc> accessed on 12 September 2007.

progress. And it can encourage us to measure our success not only by income levels, but by the freedom people have to lead fulfilling and enjoyable lives.’

2.7.1.2 Equality and non-discrimination

It has been contended that by introducing the dimension of international legal obligation, such as the standards on equality and non-discrimination, a human rights perspective adds legitimacy to poverty eradication as a primary goal of policy making. The right to equality and the principle of non-discrimination is the foundation of international human rights law. The poor are usually victims of discrimination based on various and often multiple grounds, such as birth, property, national or social origin, ethnic origin, colour, gender and religion. As discrimination causes poverty, poverty also causes discrimination. In addition to other grounds of unequal treatment, the poor often suffer discrimination because they are poor.²⁷⁹ The UN Committee on Economic, Social and Cultural Rights has also observed that “Sometimes poverty arises when people have no access to existing resources because of who they are, what they believe or where they live. Discrimination may cause poverty, just as poverty may cause discrimination.”²⁸⁰

Where governments for example are responsible for any form of discrimination, they are under an obligation imposed by international law, to end it immediately by removing all discriminatory laws and practices. Also, where discriminatory attitudes result from deeply rooted attitudes of the population, governments are expected to take the lead in inducing change through education and to equally adopt and enforce laws prohibiting any discrimination by private citizens or groups. Governments must in addition take special measures (including pro-poor policies) in order to provide to their most vulnerable, discriminated and socially excluded groups, including the poor, effective protection against discrimination by governmental authorities as well as by private actors.²⁸¹

In this way, non-discrimination and application of equality principles thus contributes to lifting people out of poverty.

2.7.1.3 The equal relevance of civil and political and economic, social and cultural rights

²⁷⁹ The Voices of the Poor, referred to above in its three volumes are illustrative of this. Poverty not only arises from a lack of resources – it may also arise from a lack of *access* to resources, information, opportunities, power and mobility.

²⁸⁰ See Poverty and the International Covenant on Economic, Social and Cultural Rights: statement adopted on 4 May 2001 by the Committee on Economic, Social and Cultural Rights (E/C.12/2001/10), para. 11 cited in OHCHR, op. cit. p. 17.

²⁸¹ See the Office of the High Commissioner for Human Rights, Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water, a Background Paper on the World Summit on Sustainable Development Johannesburg, 26 August – 4 September, 2002, p. 4-6
<<http://www.unhchr.ch/development/bp-summit.pdf>> accessed 7 August 2007.

Many UN resolutions, reports of the Special Rapporteur on the promotion and protection of human rights, Independent Expert on human rights and extreme poverty, international summit and conferences on human rights and development among others have underlined the indivisibility of rights. The recognition of the complementary relationships between civil and political rights on the one hand and economic, social and cultural rights on the other can strengthen as well as broaden the scope of poverty reduction strategies. In particular, it helps dispel the misconception that civil and political rights and freedoms are luxuries that are relevant only for affluent societies. A human rights approach insists that guarantees to ensure civil and political rights are necessary components of poverty reduction strategies.²⁸²

A human rights approach equally believes that civil and political rights should be acknowledged in practice as well as in theory as integral parts of poverty reduction, and that economic, social and cultural rights should be recognized and implemented as human rights, rather than shrugged off as fanciful ideals or abstract absolutes.²⁸³

The Independent Expert on human rights and extreme poverty in her second report stated that ‘The question of extreme poverty is one intended finally to accord the economic, social and cultural rights the equal relevance that they deserve’. In connection with the issue, the Independent Expert on human rights and extreme poverty in her second report recommended among other matters, that ‘all legislation should establish the right of all persons falling within its scope to a guaranteed minimum income and should allocate the necessary resources for this purpose.’ This according to her will facilitate access to the individual rights that are the basis of essential social services.²⁸⁴

The realization that poverty has made it impossible for the poor to afford the most basic needs or to enjoy the fundamental rights enshrined in the UDHR and fundamental rights under national laws with the non-justiciability of social economic rights, thus most jurisdictions, especially developing countries, have reaffirmed the importance given to the principles of interdependence and indivisibility of human rights.²⁸⁵ A summary of the above is that full observance and implementation of all human rights will contribute immensely to a poverty reduction strategy.

2.7.1.4 Accountability

²⁸² See OHCHR, op. cit. at p. 14.

²⁸³ See Bridging the gap between human rights and development: from normative principles to operational relevance, lecture by the United Nations High Commissioner for Human Rights - Mary Robinson at the World Bank, 3 December 2001.

<<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/2DA59CD3FFC033DCC1256B1A0033F7C3?op=endocument>> accessed 9 August 2007.

²⁸⁴ See E/CN.4/2000/52 of 25 February 2000, the second report of the Independent Expert on human rights and extreme poverty, p. 4 para i.

²⁸⁵ See ‘Poverty: An Obstacle to Human Rights’, published by the United Nations Department of Public Information DPI/ 2015, October 1998.

The emphasis on accountability of policy makers and other actors whose actions impact the rights of the people is a crucial element and contribution of the human rights approach to poverty reduction. This particular approach based on rights which imply duties, and in turn demand accountability of duties, implies that this approach will keep a check on impunity and corruption. It has therefore been deemed an intrinsic feature of the human rights approach that any poverty reduction strategy should build into it institutions and legal/administrative provisions for ensuring democratic accountability.²⁸⁶ Accountability of government and other actors have been emphasized in other poverty reduction strategy papers in order to track progress of the strategies.²⁸⁷ Therefore, if there is probity in governance and accountability for all actions, the poor will be lifted out of poverty.

2.7.1.5 Participation

A human rights approach to poverty reduction emphasizes the active and informed participation of the poor, for example in the formulation, implementation and monitoring of poverty reduction strategies (PRSs). The right to participation is regarded as a crucial human right that is linked to fundamental democratic principles. The international human rights normative framework for example includes the right to take part in the conduct of public affairs.²⁸⁸

The High Commission for Human Rights for example in Resolution 1999/26 on Human rights and extreme poverty emphasizes participation by the poorest people in the decision-making process in the societies in which they live, in the realization of human rights and in efforts to combat extreme poverty and for people living in poverty and vulnerable groups to be empowered to organize themselves and to participate in all aspects of political, economic and social life, particularly the planning and implementation of policies that affect them, thus enabling them to become genuine partners in development.

It has also been recognized that although free and fair elections are a crucial component of the right to participate, they are not enough to ensure that those living in poverty enjoy the right to participate in key decisions affecting their lives. Specific mechanisms

²⁸⁶ See OHCHR, op. cit. at p. 14.

²⁸⁷ See The challenges of globalization: the role of the World Bank, speech by James Wolfensohn, 2 April 2001; UNDP, Overcoming Human Poverty, 2000, p. 5, where Mark Malloch Brown emphasized “Accountability in the use of funds and accountability to people’s needs are also integral dimensions to pro-poor governance.”; Mary Robinson in a lecture in 2001 also stated thus: ‘Of these various principles, in my view the most defining attribute of human rights in development is the idea of accountability... All partners in the development process - local, national, regional and international - must accept higher levels of accountability.’ See Bridging the gap between human rights and development: from normative principles to operational relevance, lecture by the United Nations High Commissioner for Human Rights - Mary Robinson at the World Bank, 3 December 2001. <<http://www.unhchr.ch/huricane/hurricane.nsf/view01/2DA59CD3FFC033DCC1256B1A0033F7C3?op=endocument>> accessed 9 August, 2007; generally see OHCHR, op. cit. p. 15, for a fuller discussion on the issues where these references were made.

²⁸⁸ See, Article 21 of the Universal Declaration of Human Rights, Article 25 of ICCPR and Article 13, paragraph 1 of ICESCR. See also OHCHR, op. cit. pp. 18-19.

and detailed arrangements for the enjoyment of the right to participate have therefore been suggested which will vary greatly from one context to another, as ‘one size does not fit all.’²⁸⁹

A clear example of the burning desire of the poor to participate is replicated in the *Voices of the Poor: Crying Out for Change*, where it was observed that: “The poor want desperately to have their voices heard, to make decisions, and not to always receive the law handed down from above. They are tired of being asked to participate in government projects with low or no returns.”²⁹⁰

The enjoyment of the right to participate is therefore dependent on the realization of other human rights. For example, if the poor are to participate meaningfully in PRSs, they must be free to organize without restriction (right of association), to meet without impediment (right of assembly), and to say what they want without intimidation (freedom of expression); they must know the relevant facts (right to information) and they must enjoy an elementary level of economic security and well-being (right to a reasonable standard of living and associated rights).²⁹¹

The importance of participation was stressed by Prof. Iulia Motoc, Professor of International Law and member of the UN Sub-commission for the promotion and protection of human rights, who has been involved in the process that led in August 2006 to the adoption of draft guiding principles on extreme poverty and human rights.²⁹² The said process involves consultations with people living in extreme poverty and of those working closely with them. The guidelines which reflected the experience of the experts also affirm that the international community must make a concerted effort to foster partnership with people living in extreme poverty so that they are able to participate in the planning, implementation and evaluation of all initiatives that concern them directly.²⁹³ The guideline emphasizes participation of poor people.

2.8 Mainstreaming of human rights into the work of the UN at inter-agency level

²⁸⁹ See OHCHR, op. cit. pp. 18-19.

²⁹⁰ See Narayan, et al. (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 281 cited in OHCHR, op. cit. p. 19.

²⁹¹ See the Office of the High Commissioner for Human Rights, Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water, a Background Paper on the World Summit on Sustainable Development Johannesburg, 26 August – 4 September, 2002, p. 4-6
<<http://www.unhchr.ch/development/bp-summit.pdf>> accessed 7 August 2007.

²⁹² See A/HRC/2/2 Resolution 2006/9.

²⁹³ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November, 2006 pp.59 and 62.
<<http://www.un.org/esa/socdev/poverty/PovertyForum/Documents/forum.report.pdf>> accessed 1 May 2006.

The importance attached to the human rights approach to poverty reduction and its primacy over and above all other strategies peaked in the mainstreaming of human rights in the UN organs' activities. Mainstreaming refers to the concept of enhancing the human rights programme and integrating it into the broad range of UN activities, and also in the areas of development and humanitarian action.²⁹⁴

In 1997, the then UN Secretary-General brought about reforms reorganizing the Secretariat's work programme around the five areas that comprise the core missions of the United Nations, that is, peace and security; economic and social affairs; development cooperation; humanitarian affairs; and human rights.²⁹⁵ The reforms designated human rights as an issue cutting across the other four substantive fields of the UN's activities. The mainstreaming may have been informed by the suggestion of Mr. Leandro Despouy, Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, in his final report on human rights and extreme poverty published in 1996, in which he advocated vigorous international efforts to harmonize the activities of the various United Nations organs and institutions (especially those with an economic or social brief linked to human rights) which have a direct or indirect impact on poverty.²⁹⁶

This saw the mainstreaming of human rights fully into all of the UN's work. Under the 1997 reforms, many important initiatives have been undertaken at inter-agency level, including working with the UN Development Group to incorporate human rights standards in the Common Country Assessment and UN Development Assistance Framework (CCA/UNDAF). Similar efforts have been made under the UN Strategy for Halving Extreme Poverty by 2015 and its Options for Action.

The Office of the High Commissioner for Human Rights has been involved also in the preparation of human rights guidelines for UN Resident Coordinators as well as in encouraging various other initiatives directed at human rights integration. There is also the "Human Rights Strengthening" (HURIST) joint programme between the Office of the High Commissioner for Human and UNDP for the learning and dissemination of lessons of human integration and share experiences.²⁹⁷

Also, since 1999, the World Bank, the International Monetary Fund (IMF), and the development community in general have undertaken a new way of doing business in

²⁹⁴ See OHCHR, Human Rights in Development

<<http://www.unhchr.ch/development/mainstreaming.html>> accessed 3 September 2007.

²⁹⁵ See OHCHR, Human Rights in the Report of the Secretary-General on Renewing the United Nations: a Programme for Reform (Extracts from the report of the Secretary-General to the General Assembly, Renewing the United Nations: A Programme for Reform, A/51/950, 14 July 1997)

<<http://www.unhchr.ch/html/hchr/unrefor.htm>> accessed 3 September 2007.

²⁹⁶ See para 12

<[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1996.13.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1996.13.En?Opendocument)> accessed 13 August 2007.

²⁹⁷ See Bridging the gap between human rights and development: from normative principles to operational relevance, lecture by the United Nations High Commissioner for Human Rights - Mary Robinson at the World Bank, 3 December 2001 <<http://www.ohchr.org>> accessed 13 August 2007.

low income countries, using a Poverty Reduction Strategy Paper (PRSP)²⁹⁸ as a basis for access to concessional lending and other forms of development assistance. There is little dispute that human rights and poverty reduction strategies are both connected to the well-being of vulnerable groups in society.²⁹⁹

Another important contribution of the rights-based approach to poverty reduction strategies is not only reflected in the mainstreaming of human rights as noted above, but the achievement of specific human rights objectives which now form the basis of development cooperation policy implementation. Different institutions, including the World Bank, the UN Human Rights Council and major human rights NGOs - have started to look at the implications of a human rights approach. Many are also working in partnership with actors from different sectors of society to seek out concrete ways to make human rights a reality for all, including the poorest of the poor.³⁰⁰

2.9 Capacity approach contrasted

One of the elements of Sen's capacity approach of not regarding all kinds of capacity failures as poverty, has been contrasted with the human rights approach of not qualifying non-fulfilment of all human rights as poverty.³⁰¹ This is particularly reflected in the report of the four member *ad hoc* working group appointed by the Sub-Commission on the Promotion and Protection of human rights and mandated to prepare a study on the drafting of an international declaration on extreme poverty and human rights.³⁰² The *ad hoc* working group with José Bengoa as coordinator, met in February 2002 and held in-depth discussions on the requested study, submitting to the Sub-Commission a programme of work proposed for three years. The report setting out the proposed working paper or programme of work is contained in E/CN.4/Sub.2/2002/15 of 12 June 2002.³⁰³

In its report the *ad hoc* working group prioritized rights by ascribing much importance to the right to life, with four other basic rights to adequate food, drinking water, shelter and health to be components of the right to life, and that a person or group of persons

²⁹⁸ The PRSP is a national document that is expected to provide a comprehensive analysis of poverty.

²⁹⁹ See Gobind Nankani, John Page, and Lindsay Judge, "Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?", in Philip Alston and Mary Robinson (eds) (2005), *Human Rights and Development Towards Mutual Reinforcement*, Oxford University Press, p. 1.

³⁰⁰ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November 2006 p. 58.

³⁰¹ See OHCHR, op. cit. p. 11.

³⁰² The Sub-Commission on the Promotion and Protection of human rights was itself requested by the Commission on Human Rights to carry out a study on poverty and human rights with a view to prepare a study to contribute to the drafting of an international declaration on extreme poverty and human rights. See Gender Equality and Human Rights-Poverty
<<http://www.hri.ca/hrdevelopment/prologue/un/poverty/povertyspp2002.html>> accessed 22 August 2007.

³⁰³ Ibid.

lacked them is considered to be living in extreme poverty. The *ad hoc* group then formulated a number of obligations at various levels.³⁰⁴

However, the idea that non-fulfilment of only certain kinds of human rights and not others will count as poverty seems to militate against the principle of indivisibility of rights, which states that all human rights are equally important.³⁰⁵ However, this has been defended as not being necessarily so, on the grounds that the principle of the indivisibility of human rights does not mean that all social phenomena must be defined by reference to all rights. Just in the same way the principle of the indivisibility of human rights does not demand that poverty be defined by reference to all the rights set out in the International Bill of Rights, but it does demand an inclusive strategy for addressing poverty.³⁰⁶

The *ad hoc* group also justified this priority by contending that ‘the right to education, the right to work and all civil and political rights and economic, social and cultural rights are dependent on the basic minimum rights that constitute the right to life,’ and that ‘It is impossible to carry out educational plans when the right to life is threatened; the same may be said about political rights, which are seriously threatened when the right to life is at risk.’³⁰⁷

The initiative for a Declaration on extreme poverty as a violation of human rights has however been described as not only incomplete, but also incompatible with other analysis about the relation between human rights violations and poverty.³⁰⁸ It was contended that although extreme poverty situations raise in many life-threatening situations, it was argued that the process leading millions of peoples to death by poverty is one that should be addressed before it reaches such a dramatic end. It was further argued that by focusing on one extreme (right to life) based on the *jus cogens* status of the UDHR (Article 3), the *ad hoc* working group is itself fragmenting the logic of the full realization of all human rights.³⁰⁹

³⁰⁴ See Para 17 of E/CN.4/Sub.2/2002/15.

³⁰⁵ The Declaration on Social Progress and Development proclaims the recognition and effective implementation of civil and cultural rights without any discrimination. See Article 2 of the Declaration, adopted in 1969 by the UN General Assembly in Resolution 2542 (XXIV); Article 6(2) of the Declaration on the Right to Development emphasizes the indivisibility and interdependence of all human rights and fundamental freedoms and that equal attention and urgent consideration to the implementation, promotion and protection of civil, political, economic, social and cultural rights. Declaration on Right to Development adopted by UN General Assembly Resolution 41/128 of 4 December 1986 <<http://www.unhchr.ch/html/menu3/b/74.htm>> accessed 5 August 2007.

³⁰⁶ See OHCHR, op. cit. p. 11.

³⁰⁷ See Para 18 of E/CN.4/Sub.2/2002/15; see also the Report of the Independent Expert on human rights and extreme poverty, paras 17 and 18.

³⁰⁸ See Lucie Lamarche, *Beyond the Rhetoric of Social Rights for the Poor: the Need to Promote a Methodology aimed at Reinforcing International and National Institutions, “Ethical and Human Rights Dimensions of Poverty: Towards a New Paradigm in the Fight Against Poverty”* Jurist Seminar –Sao Paulo-May 2003 (UNESCO Poverty Project) pp. 9-10.

³⁰⁹ Ibid.

The argument against fragmentation of rights may be sustained if we accept that poverty extends beyond those who suffer from deep, persistent and widespread want and isolation. The poor includes the indigent, who must live below minimum acceptable standards at a given time and those who feel deprived of what is enjoyed by other people in the society of which they consider themselves to be a part.³¹⁰

However, the common grounds of the capacity and human rights approaches to poverty lie also in the definition of the term poverty. The capability approach defines poverty as the absence or inadequate realization of certain basic freedoms, such as the freedoms to avoid hunger, disease, illiteracy and so on. The reason why the conception of poverty is concerned with basic freedoms is that these are recognized as being fundamentally valuable for minimal human dignity. The same concern for human dignity also motivates the human rights approach, which postulates that people have inalienable rights to these freedoms.³¹¹ If someone has failed to acquire these freedoms, then obviously her rights to these freedoms have not been realized. Therefore, poverty can be defined equivalently as either the failure of basic freedoms – from the perspective of capabilities or the non-fulfilment of rights to those freedoms – from the perspective of human rights.³¹²

On the basis that not all non-fulfilment of rights will constitute poverty, the human rights approach has been that non-fulfilment of human rights would only amount to poverty when it meets the following two conditions:³¹³

- The human rights involved must be those that correspond to the capabilities that are considered basic by a given society.
- Inadequate command over economic resources must play a role in the causal chain leading to the non-fulfilment of human rights.

It has been rightly noted that although only some human rights may form part of a human rights definition of poverty, a much wider range of rights will be vital in any discourse on poverty and indispensable in the formulation of poverty reduction strategies.³¹⁴

Emphasizing the human rights approach to poverty reduction strategies, the UN High Commissioner for Human Rights, Louise Arbour, on the occasion of the Human Rights Day, 10 December 2006 stated as follows:³¹⁵

³¹⁰ See Report on the World Social Situation 1997 p. 64.

³¹¹ The Vienna Declaration states that ‘Human rights and fundamental freedoms are the birthright of all human beings ...’ See Vienna Declaration and Programme of Action para 1 (A/CONF.157/23 12 July 1993) of the World Conference on Human Rights, held in Vienna, 14-25 June 1993.

³¹² See OHCHR, op. cit. pp. 9-10.

³¹³ Ibid p. 10.

³¹⁴ Ibid p. 12. The term poverty reduction strategies as used here is not the same as poverty reduction strategy papers (PRSP) used by international financial institutions, notably the World Bank and International Monetary Fund (IMF), which refer to a national document that is expected to provide a comprehensive analysis of poverty.

³¹⁵ See The UN High Commissioner for Human Rights, Louise Arbour’s message on the occasion of the Human Rights Day, 10 December 2006.

<<http://www.unhchr.ch/huricane/huricane.nsf/view01/076DEB0923674510C125723E0026F302?opendocument>> accessed 12 August 2007.

'All countries, independent of national wealth, can take immediate measures to fight poverty based on human rights. Ending discrimination, for example, will in many cases remove barriers to decent work and give women and minorities access to essential services. Better distribution of collective resources and good governance, exemplified by tackling corruption and ensuring the rule of law, are within the reach of every state.'

2.9 Legal empowerment approach to poverty reduction

An independent and non-governmental global initiative launched by a group of developing and developed countries in 2005 is the Commission on Legal Empowerment of the Poor,³¹⁶ with a mandate to focus on the link between exclusion, poverty and the law, and how to help poor people lift themselves out of poverty, by working for policy and institutional reforms that expand their legal opportunities and protections.³¹⁷

In other words, the Commission is to explore how nations can reduce poverty through reforms that expand access to legal protection and opportunities for all.³¹⁸ It is the Commission's belief that the poor can only benefit through law if they also have a stake in the economy through the rule of law. The Commission has a mandate to complete its work in 2008 and has in the month of June 2008 released two reports covering its works.³¹⁹ Volume I of the report is the outcome of research, analysis and consultations in more than 20 developing countries and it highlights the various sources of legal exclusion in the different countries.³²⁰

'The Commission believes that poverty is man-made, by action and inaction, and a failure of public policies and of markets.'³²¹ Therefore, legal empowerment for the poor is premised on four pillars of access to justice and the rule of law, property rights, labour rights and 'business rights'.³²² These four pillars are informed by reason of the fact that poor people cannot be empowered when they 'are denied access to a well-functioning justice system; lack effective property rights and the intrinsic economic power of their

³¹⁶ This independent and non-governmental global initiative was launched by a group of developing and developed countries including Canada, Denmark, Egypt, Finland, Guatemala, Norway, Sweden, South Africa, Tanzania and the United Kingdom. It has been hosted by the United Nations Development Programme (UNDP) in New York. It is co-chaired by former U.S. Secretary of State, Madeleine Albright, and the Peruvian economist, Hernando de Soto. The High Level Commission on Legal Empowerment for the Poor is composed of eminent policy makers and practitioners, former dignitaries, academics and only one civil society representative from around the world. See Commission on Legal Empowerment of the Poor, <<http://www.undp.org/legalempowerment/>> accessed 20 October 2006.

³¹⁷ See Commission on Legal Empowerment of the Poor, *Legal Empowerment: Unlocking Human Potential* p. 2 <http://www.undp.org/legalempowerment/pdf/Legal_Empowerment_Brochure.pdf> accessed 20 November 2006.

³¹⁸ Ibid.

³¹⁹ See Report of the Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone Volume I, New York 2008* and *Making the Law Work for Everyone, Volume II, Working Group Reports* (pre-publication edition) New York 2008.

³²⁰ See Report of the Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone Volume I*, op. cit. Preface.

³²¹ Ibid p.2.

³²² Ibid at p. 5.

property remains untapped; poor people, in particular women and children, suffer unsafe working conditions because their employers often operate outside the formal legal system; poor people are denied economic opportunities as their property and businesses are not legally recognized; they cannot access credit, investment nor global and local markets.³²³ Laws and legal procedures that would guarantee rights are often not enforced and are not designed to work for the poor.

The Commission reported that four billion people around the world are not adequately protected by law through ‘open and functioning institutions, and, for a range of reasons, are unable to use the law effectively to improve their livelihoods.’³²⁴ It is thus reasoned that a ‘valuable voice for structural changes that will provide the poor a valuable tool as they work to pull themselves from the grips of poverty.’³²⁵ The Commission also added that ‘in too many countries, the laws, institutions, and policies governing economic, social, and political affairs deny a large part of society the chance to participate on equal terms. The rules of the game are unfair. This stunts economic development and can readily undermine stability and security’ and that ‘there is compelling evidence that when poor people are accorded the protections of the rule of law, they can prosper.’³²⁶

The Commission found for example, that in most of the developing countries, the poor have a problem of legal identity, whether by way of birth certificate, national identity card and other means of identification, and even legal address.³²⁷ Consequently, they are denied the opportunity and benefits associated with legal identity, such as being unable to open a bank account, vote in elections, access medical services, register in school, etc.,³²⁸ which is contrary to the right of everyone to be recognized as a person before the law.³²⁹ In fact, the births of most children in developing country are found not to be registered³³⁰ and the poor have no access to basic public services. The poor are said to lack recognized rights they are vulnerable to abuse and the local communities are robbed of political participation and their human rights violated. Their moderate assets, work and livelihood are insecure and unprotected by law. It was stated that where the poor are not excluded by the legal system, they are often oppressed by it,³³¹ as the authorities of institutions often discriminate, demand bribes or take the side with powerful interests.³³²

It was also stated that the poor have no business rights as they operate their businesses outside the formal system, such that opportunities for growing their businesses are grossly limited or almost non-existent with a lack of contract rights, legal protection in business through registration, labour contracts, capital markets, workers associations,

³²³ Ibid Preface.

³²⁴ Ibid p. 19.

³²⁵ Ibid Preface.

³²⁶ Ibid p. 2.

³²⁷ See Report of the Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume II, op. cit. p. 4.

³²⁸ Ibid.

³²⁹ See Article 6 of Universal Declaration on Human Rights.

³³⁰ See Report of the Commission on Legal Empowerment of the Poor, Vol. II op. cit. p. 5.

³³¹ See Report of the Commission on Legal Empowerment of the Poor, Vol. 1 op. cit. p. 2.

³³² Ibid at p. 3.

soft loans, investments and financial instruments, insurance, etc.³³³ The poor consequently, can only raise money through communal savings plans or thrift and cooperative systems, by daily contributions, with the attendant deprivations, such as having to forgo 'the purchase of new clothes for a child, food for the family, or a used bicycle for transportation', etc in order to meet up their contributions.³³⁴

The poor are also indicated as having no rights to their shack or market stall, that they live in constant fear of being evicted by local officials or landlords.³³⁵ The Commission revealed that, although the poor struggle to survive through honest, hard work, this is made almost impossible by external forces such as the police and local officials who demand bribes, threaten to evict them or confiscate their goods time without number. In some cases, their goods are actually confiscated; they are harassed and sometimes beaten up by council officials/law enforcement agents.³³⁶ They are thus locked out of economic opportunity in their own countries and in the global marketplace, rendering transiting from informal to formal sectors of the economy impossible.

The Commission also highlights the problem encountered by the poor with respect to property rights in view of the fact that they possess assets of some kind. It noted that the poor lack a formal way to document these possessions through legally recognized tools such as deeds, contracts and permits.³³⁷ For example, poor people have landed properties both in the urban and rural arrears, but lack land rights that will enable them to use it for empowerment, by using them as securities to raise loans for businesses or other purposes as most of the lands are covered tenures which are not secured.³³⁸ These tenures are not usually evidenced in writing in the form of deeds or other legal title which can be used as collateral for mortgages to raise loans for business or for other legal purposes, which will contribute to their economic growth and poverty reduction. The properties then remain dormant throughout the lifetime of the owners.³³⁹

The poor are also under threat of wrongful eviction, expropriation, extortion, exploitation or actual eviction without compensation or any form of legal redress. Thus, the physical property and their tenure over the same are not protected.³⁴⁰ In some countries such as Nigeria for example, title documentation and registration are not accessible to the poor owing to the high cost and the bureaucracy that surrounds procuring legal title. The regulatory environment for starting a business is equally inclement and suffocating, thus breeding corruption and other middle-men activities.³⁴¹

³³³ Ibid p. 2.

³³⁴ Ibid p. i.

³³⁵ Ibid. p. 13.

³³⁶ Ibid p. 14.

³³⁷ See Commission on Legal Empowerment of the Poor, *Legal Empowerment: Unlocking Human Potential*, p. 2.

³³⁸ The Commission reported that customary land tenure law covers roughly 75 percent of land in sub-Saharan Africa. See Report of the Commission on Legal Empowerment of the Poor, Vol. I op. cit. p. 42.

³³⁹ Ibid p. 28.

³⁴⁰ See Department for International Development, *Security, Justice and Growth-Nigeria*, British Council, 2005.

³⁴¹ Ibid.

The Commission also highlighted the benefits that can accrue from the poor's ability to find protection and opportunity in the legal system, such as the widening of the tax base when the informal economy becomes documented, resulting in increased revenue for national development. The economic gains will in turn expand 'local markets and increase financial activity at all levels, and as the rule of law spreads, the predatory networks that exploit vulnerable participants in the informal economy begin to unravel, and more and more people develop a stake in the reduction of crime and the maintenance of a peaceful social order.'³⁴² It therefore advocates national transformation that requires comprehensive legal, political, social and economic reforms.³⁴³

Towards realizing the objectives of legal empowerment for the poor, the Commission recommends comprehensive forms with respect to justice, which will involve among other factors, improved identity registration systems, without user fees; effective, affordable and accessible systems of alternative dispute resolution; legal simplification and standardization and legal literacy campaigns targeting the poor; stronger legal aid systems and expanded legal service cadres with paralegals and law students; structural reform enabling community-based groups to pool legal risks; the repeal or modification of laws and regulations that are biased against the rights, interests and livelihoods of poor people; making the formal judicial system, land administration systems, and relevant public institutions more accessible by recognizing and integrating customary and informal legal procedures with which the poor are already familiar; and encouraging courts to give due consideration to the interests of the poor.³⁴⁴

On property rights, the Commission recommends that an efficient property rights governance system be institutionalized that will bring the extralegal economy into the formal economy and ensure that it remains easily accessible to all citizens; promotion of an inclusive property rights system that will automatically recognize real and immovable property bought by men as the co-property of their wives or common law partners, as well as clear inheritance rules; ensuring that all property recognized in each nation is legally enforceable by law and that all owners have access to the same rights and standards; reinforcement of property rights, including tenure security, through social and other public policies, such as access to housing.³⁴⁵

The Commission recommends further the distribution of state land legal guidelines for forced relocation, including fair compensation; recognition of a variety of land tenures, including customary rights, indigenous peoples' rights, group rights, certificates, etc., including their standardization and integration of these practices into the legal system; State land audits with findings published to discourage illegal taking possession of public land and simplified procedures to register and transfer land and property.³⁴⁶

In respect of labour rights, the Commission recommends the recognition and enforcement of fundamental rights at work, especially freedom of association, collective

³⁴² See Report of the Commission on Legal Empowerment of the Poor, Vol. I op. cit. p. 4.

³⁴³ Ibid at p. 19.

³⁴⁴ Ibid pp. 5 and 60.

³⁴⁵ Ibid at p. 60.

³⁴⁶ Ibid.

bargaining and non-discrimination, and improved quality of labour regulation; inclusive approaches to social protection, delinked from the employment relationship; labour rights (health and safety, hours of work, minimum income) extended to workers in the informal economy, and more opportunities for education, training and retraining.³⁴⁷ Related to this, is business rights and it is recommended that the following be put in place: appropriate legal and regulatory frameworks, including enforceable commercial contracts, private property rights, use of public space; fair commercial transactions between informal enterprises and formal firms; financial, business development and marketing services for informal enterprises; micro business incentives, including government procurement, tax rebates, and subsidies, and social protection for informal entrepreneurs.³⁴⁸

In terms of implementation of the recommendations, while the Commission recognized the government as the primary ‘duty bearer’, it nevertheless advocates a supportive role for the UN, multilateral institutions, and the integration of legal empowerment agenda as a core concern of global multilateral agencies such as the World Bank, UNDP, ILO, FAO and UN-HABITAT, in order to achieve the objectives. Regional Banks, political and other institutions, civil society, community and faith-based organizations, various professional associations, including jurists, lawyers, land administration officials, surveyors and urban planners are equally deemed important in gathering and disseminating information in their respective communities and networks and in offering political support for legal empowerment and access to justice reform, as well as increased funding for necessary legal aid and other services.³⁴⁹

2.9.1 Human rights content

Needless to say, the legal empowerment of the poor initiative rests on a human rights approach, as the four pillars of the initiative are access to justice and the rule of law, property rights, labour rights and business rights, which are in themselves an integral part of human rights. The work of the Commission as reflected in its two reports mentioned above is basically a rights-based approach. The Commission in particular has linked legal empowerment to governments’ obligations to respect, protect and fulfil human rights, and stated that the poor will be legally empowered if they ‘are realising more and more of their rights, and reaping the opportunities that flow from them, through their own efforts as well as through those of their supporters, wider networks, and governments.’³⁵⁰

Furthermore, the elements of the legal empowerment approach are grounded on the spirit and letter of international human rights law, and particularly in Article 1 of the UDHR, which declares, ‘All human beings are born free and equal in dignity and rights.’³⁵¹ This indicates the basis for selection of the legal empowerment approach to poverty reduction for consideration in this work.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid at p. 10.

³⁵⁰ Ibid at p. 4.

³⁵¹ Ibid.

2.10 Conclusion

The interlocking nature of all the above approaches can be gleaned from many aspects, as epitomized in UN Secretary-General's message to commemorate the occasion of the International human rights day on 10 December 2006 when he stated:³⁵²

'Today, development, security and human rights go hand in hand; no one of them can advance very far without the other two. Indeed, anyone who speaks forcefully for human rights but does nothing about human security and human development – or vice versa – undermines both his credibility and his cause. So let us speak with one voice on all three issues, and let us work to ensure that freedom from want, freedom from fear and freedom to live in dignity carry real meaning for those most in need.'

The seriousness of poverty on human rights was illustrated by Kofi Annan³⁵³ when he stated that: '... No social phenomenon is as comprehensive in its assault on human rights as poverty.' Poverty has therefore been indisputably recognized as a serious block to the realization of all human rights and that it constitutes a threat to the survival of the greatest number of human population. The UN General Assembly has submitted that extreme poverty and exclusion from society constitutes a violation of human dignity.³⁵⁴

A human rights-based approach to poverty views the poor as holding inalienable, fundamental rights that must be respected, protected and fulfilled, as these rights preserve the sacredness of the human person. In this connection, the UN General Assembly has recognized that surmounting extreme poverty constitutes an essential means to the full enjoyment of political, civil, economic; social and cultural rights.³⁵⁵ Also, a human rights definition and understanding of poverty leads to more adequate responses to the many facets of poverty, responses that give due attention to the critical vulnerability and subjective daily assaults on human dignity that accompanies poverty. A human rights approach also importantly looks not just at resources but also at capabilities, choices, security and power needed for the enjoyment of an adequate standard of living and other fundamental civil, cultural, economic, political and social rights.³⁵⁶

As some poverty reduction strategies already have features that reflect international human rights norms, for example, the emphasis placed on civil society participation in the Poverty Reduction Strategy Paper approach advocated by the World Bank and the

³⁵² See The UN Secretary-General's message on International human rights day 10 Dec 2006, op. cit.

³⁵³ See Office of the United Nations High Commissioner for Human Rights, *Human Rights Dimension of Poverty* <<http://www.ohchr.org/english/issues/poverty/index.htm>> accessed 10 January 2007.

³⁵⁴ See General Assembly Resolution 53/146 on Human Rights and Extreme Poverty, adopted on December 18, 1992 ; see also, Frontline, *Poverty as a Violation of Human Rights*, at <<http://www.frontlinedefenders.org/manuals/117>> accessed 14 April 2007.

³⁵⁵ See General Assembly Resolution 53/146 on Human Rights and Extreme Poverty, adopted on 18 December, 1992 ; see also, Frontline, *Poverty as a Violation of Human Rights*, op. cit.

³⁵⁶ See Office of the UN High Commissioner for Human Rights, *Human Rights in Development*, <<http://www.unhchr.ch/development/poverty-02.html>> accessed 15 May 2007.

IMF, this reflects the right of individuals to take part in the conduct of public affairs, as well as the related rights of association, assembly and expression. The introduction of social safety nets reverberates with the rights to a reasonable standard of living, food, housing, health protection, education and social security. Anti-poverty strategies that demand transparent budgetary and other governmental processes are consistent with the right to information. By introducing the dimension of an *international legal obligation*, the human rights perspective adds legitimacy to the demand for making poverty reduction the primary goal of policy making,³⁵⁷ rather than one of appeals to charity or altruism.³⁵⁸

The uniqueness of the human rights approach to poverty reduction lies in its departure from existing strategies both in the manner in which it departs from existing strategies, but nonetheless reinforces such existing strategies. The emphasis placed on the complementarities between civil and political rights, and social economic rights by the human rights approach has broadened and given impetus to the scope of poverty reduction strategies.³⁵⁹ The essential idea underlying the adoption of a human rights approach to poverty reduction is that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in the international law of human rights,³⁶⁰ which is the approach being explored in this work.

The next chapter will examine the problem and causes of poverty in Nigeria, efforts to deal with it and how it impacts on the rights of the poor.

³⁵⁷ Office of the UN High Commissioner for Human Rights
<<http://www.unhchr.ch/development/povertyfinal.html>> accessed 12 February 2007.

³⁵⁸ See The UN High Commissioner for Human Rights, Louise Arbour's message on the occasion of the Human Rights Day, 10 December 2006.

³⁵⁹ Office of the UN High Commissioner for Human Rights
<<http://www.unhchr.ch/development/povertyfinal.html>> accessed 12 February 2007.

³⁶⁰ Ibid.

CHAPTER 2

PROBLEM OF POVERTY IN NIGERIA AND IMPLICATIONS OF POVERTY ON HUMAN RIGHTS OF THE POOR

2.1 PROBLEM OF POVERTY IN NIGERIA

Nigeria is the most populous black nation in sub-Saharan Africa and according to the results of the population census conducted in year 2006, the country has a population of approximately 140 million.³⁶¹ There are more than 350 ethnic/linguistic groups in the country.³⁶² The country is the tenth largest in Africa, lies on the West coast of Africa and occupies approximately 923,768 square kilometres of land bordering Niger, Chad, Cameroon and Benin. Nigeria is made up of 36 States and Abuja, the Federal Capital Territory. These are further divided into approximately 744 local government areas.³⁶³

The country returned to democratic rule in May 1999 under a presidential system of government after a period of over thirty years of military rule. Nigeria operates a federal system of government with three tiers: Federal, State and Local. The central government is referred to as the Federal Government comprised of the elected President, who is the Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation,³⁶⁴ Vice-President and appointed Ministers and the National Assembly, with the seat of government at Abuja. The National Assembly is bi-cameral, comprising of the Senate (the upper house) - headed by the President of the Senate (elected by members of Senate) - and the House of Representatives (the lower house) - headed by the Speaker (elected by members).

Each of the 36 states has its own executive arm and a house of assembly. The executive arm of each state is headed by the elected Governor³⁶⁵ of that state, Deputy-Governor and appointed Commissioners, while the House of Assembly is headed by a Speaker (elected by members of the House). Each of the 774 Local Governments³⁶⁶ has a Chairman, as head of the executive arm and there are councillors as the legislative arm.

The 1999 Constitution shares legislative powers between the Federal and the State Governments. The Federal Government only, through the National Assembly has power to legislate on matters contained in the Exclusive Legislative List, while both the

³⁶¹ According to the results released in January, 2007 and ratified by the Federal Executive Council at their meeting of 9th January, 2007 the actual figure is 140,003,542. Bolade Omonijo, Rotimi Ajayi and Ben Agande, op. cit.; since 2006, the population estimate of Nigeria has been recognized as 140 million. See U.S. Department of State-Bureau of African Affairs, January 2008 - Nigeria <<http://www.state.gov/r/pa/ei/bgn/2836.htm>> accessed 2 February 2008.

³⁶² See Nigeria's MDG Report 2004. Available at <http://www.undg.org/documents/5430-Nigeria_MDG_Report_-_Nigeria_Profile.pdf> accessed December 2006.

³⁶³ Ibid.

³⁶⁴ See Section 130 of the 1999 Constitution.

³⁶⁵ Ibid Section 176.

³⁶⁶ Ibid Section 7.

Federal and State Governments have powers in respect of matters on the Concurrent Legislative List.³⁶⁷ Any matter not contained in the two lists is deemed to be under the Residual List (though the contents of this are not specified) and such matter is within the exclusive legislative powers of the State House of Assembly.

At the judicial level, the Federal Government creates and controls the Supreme Court,³⁶⁸ which is at the apex of courts in Nigeria. Next to this is the Court of Appeal,³⁶⁹ which is also created and controlled by the Federal Government. The Federal High Courts,³⁷⁰ High Court, the Sharia Court of Appeal, Customary Court of the Federal Territory³⁷¹ and the National Industrial Court are under the control of the Federal Government. While each state creates a High Court³⁷² and as the case may be either Sharia Court of Appeal³⁷³ (this is peculiar to the Northern part) or Customary Court of Appeal³⁷⁴ (this is peculiar to the Southern part) the states have judicial powers, but the Federal is wholly responsible for the appointment and discipline of judicial officers. Below this hierarchy of courts at the State levels are other inferior courts, e.g. Magistrates Courts, Area courts, Upper Area Courts and Customary Courts, which the states have powers to establish.

The World Bank Report: *Attacking Poverty* for 200/2001 indicates that 70.2 percent of the Nigerian population survives on less than US\$1 per day, with a poverty gap³⁷⁵ of 34.9 percent, while 90.8 percent of the population lives on US\$2 a day with a poverty gap of 59.0 percent.³⁷⁶ Nigeria is also ranked among the 20 poorest countries in the world.³⁷⁷ This ranking was restated in January, 2007 by the United Nations Children's Fund (UNICEF) Assistant Representative D- Field Office in Nigeria, Mr. Mohammed B. Jalloh.³⁷⁸

³⁶⁷ Ibid Section 4. The Exclusive Legislative List contains among others matters such as defence, customs and excise duties, arms, ammunition and explosives, currency, coinage and legal tender, banks and bills of exchange, evidence, drugs and poisons, aviation, exchange control, external affairs, immigration, export duties, passports and visas, military, police and implementation of treaties, etc. See 1999 Constitution Second Schedule Part I. The Concurrent Legislative List contains matters such as stamp duties, collection of any tax, fee or rate, health, electric power stations and power to establish an institution for the purposes of university, post-primary, technological or professional education, etc. See 1999 Constitution Second Schedule Part II.

³⁶⁸ See Sections 230 and 231 of the 1999 Constitution.

³⁶⁹ Ibid Sections 237 and 238.

³⁷⁰ Ibid Sections 249 and 250.

³⁷¹ Ibid Sections 255, 256, 260, 261, 265 and 266.

³⁷² Ibid Sections 270 and 271.

³⁷³ Ibid Sections 275 and 276.

³⁷⁴ Ibid Sections 280 and 281.

³⁷⁵ Poverty or 'Income gap' measures the additional income that would be needed to bring all the poor up to the level of the poverty line, i.e. the minimal extra income that would be sufficient to wipe out poverty - in the form of low income - altogether. See Amartya Sen, op. cit. p. 103.

³⁷⁶ World Bank (2000): *World Bank Development Report 2000/201: Attacking Poverty*, Part V. Table 4 Poverty, p. 1.

³⁷⁷ See Nigeria: Country Strategy Paper 2000-2002, the United Kingdom's Department for International Development (DFID), Sept. 2000, pp. 1-2.

³⁷⁸ At the ceremony marking the 60th anniversary of UNICEF in Nigeria, at <<http://www.net/news/sources/2007/Jan/10/500.html>> accessed 12 January 2007; poverty rate in the world has been put at the following: 1.3 billion people live on less than one dollar a day; 3 billion live

Tracing the level of poverty in Nigeria amidst the political and economic instability, the World Bank in *Voices of the Poor* looked at the trend of poverty in Nigeria when it stated that³⁷⁹ ‘poverty in Nigeria has steadily grown worse since first measured in 1980. In that year the World Bank added that the expenditure poverty rate stood at 27.2 percent, with close to 18 million people classified as poor. In 1985 the rate increased to 46 percent, and then declined slightly in subsequent years. The poverty rate surged again to nearly 66 percent of the population in a 1996 survey, affecting 67 million people. About 30 million of these people are extremely poor and cannot meet their basic food needs. Urban poverty grew at a very fast rate from 17 percent in 1980 to 58 percent in 1996, although it is still less extensive than rural poverty (70 percent in 1996). The northwest region accounts for the largest share (40 percent) of the country's poor people, but the most severe poverty lies across the southern regions of the country.’³⁸⁰

Several other reports and studies have been carried out on Nigeria to examine the incidence and dimension of poverty in Nigeria, and their conclusion was that of high and widespread poverty in Nigeria.³⁸¹ In a 2006 publication, a coalition of Civil Society Organizations and Government Oversight Agencies in Nigeria committed to fighting against corruption stated that as at 1999, when the country returned to democracy, over 70 percent of Nigerians were living in poverty.³⁸² The widespread poverty in Nigeria is in spite of the fact that the crude oil price was USD\$20 in 1999 when Nigeria returned to democracy; the price soared from USD\$50 to \$70 in the last eight years. This was corroborated in a 2006 analysis on Nigeria which stated that even with its substantial oil wealth, Nigeria ranks as one of the poorest countries in the world, and more than 70 percent of the population lives in poverty.³⁸³

on under two dollars a day; 1.3 billion have no access to clean water; 3 billion have no access to sanitation; 2 billion have no access to electricity. See also James Wolfenson, *The Other Crisis*, World Bank, October 1998 <<http://www.globalissues.org/TradeRelated/Facts.asp>> accessed 12 January 2007; see also World Bank (2000), *World Development Report: Attacking Poverty 2000/2001*, p. 3, which stated that the world has deep poverty amid plenty, out of the world's 6 billion people, 2.8 billion - almost half - live on less than \$2 a day and 1.2 billion - a fifth - live on less than \$1 a Day, at <<http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/overview.pdf>> accessed 12 January 2006.

³⁷⁹ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 87.

³⁸⁰ Ibid.

³⁸¹ See Odusola, A. F., (1997), *Poverty in Nigeria: An Eclectic Appraisal, Poverty Alleviation in Nigeria*, Selected Papers for the 1997 Annual Conference,; Kayode, M.O. and Odusola, A. F., *Poverty in the Midst of Plenty*, paper delivered at the Annual Dialogue of the Obafemi Awolowo Foundation, Nigerian Institute of International Affairs, Lagos, 4-5 December, 2000; UNICEF: *The State of the World's Children 1999 Education*, UNICEF (1999) cited in M. I. Obadan and A. F. Odusola, “The Economy and Poverty in Nigeria” in D.A. Guobadia and Epihany Azinge, (eds) (2004), *Poverty, The Nigerian Economy and the Law*, NIALS, Lagos, p. 43; M. I. Obadan and A. F. Odusola, op. cit. p. 430. The authors further made reference to the tables from the Federal Office of Statistics, which indicated that poverty levels rose from 28.1 percent of the population in 1980 to 46.3 and 65.6 percent in 1985 and 1996 respectively; see M. I. Obadan and A. F. Odusola, op. cit. p. 430.

³⁸² See Zero Corruption Coalition, Citizens Handbook on Independent Corrupt Practices Commission (ICPC) and Economic and Financial Crimes Commission (EFCC), September, 2006, p. 9.

³⁸³ See Energy Information Administration, Official Energy Statistics from the U.S. Government, Country Analysis Briefs, Nigeria, March 2006 <<http://www.eia.doe.gov/emeu/cabs/Nigeria/Background.html>> accessed 28 December 2006.

In Nigeria's Millennium Report, the number of people living in poverty as at 1996 was put at 65.6 percent (67.1 million people) and in the executive summary of the report, the high incidence of poverty was acknowledged at the time of the report in 2004 thus confirming the credibility of the poverty rate in Nigeria as indicated above. At the time of the said report in 2004, despite the fact that the MDGs target was still 11 years away, the Nigerian government had already indicated its inability to meet them, and it stated that 'based on available information, it is unlikely that the country will be able to meet most of the goals by 2015 especially the goals relating to eradication of extreme poverty and hunger, reducing child and infant mortality and combating HIV/AIDS, malaria and other diseases.'³⁸⁴

However, a year following Nigeria's Millennium Report, it came up with a poverty report for 2005 based on the result of the Nigeria Living Standard Survey, 2003/2004, carried out by the National Bureau of Statistics which gave the national incidence of poverty as 54.7 percent.³⁸⁵ The report failed to indicate convincing empirical manifestations of poverty reduction in the country.

It is necessary to state here that the former Nigerian President Olusegun Obasanjo has faulted the world poverty indices, which based poverty on living on less than \$1 a day, according to him, such statistics could no longer apply to countries like Nigeria where the dollar is not the national currency, and also that most people in the village can afford three square meals because they feed themselves directly from the farms.³⁸⁶ The former President had at various times queried the \$1 a day benchmark for poverty, claiming that this does not take into consideration people in the rural areas who are not government workers, and therefore cannot be categorized as poor as those in the urban centres, and therefore rejected the poverty rate ascribed to the country.

The said Nigeria's Poverty Profile for 2005³⁸⁷ indicates the following:

- i.) That poverty was higher in rural areas with a poverty incidence of 60.6 percent, while urban poverty incidence was given as 40.1 percent.
- ii.) That combining food consumption of 2,900 calories with a component of non-food showed a rural poverty rate of 63.8 percent, with an urban poverty rate of 43.1 percent.

³⁸⁴ See Nigeria: MDGs Report 2004. <http://www.undg.org/documents/5430-Nigeria_MDG_Report_-_Annex_2_Poverty_Data.pdf> accessed 1 March, 2006; in the UNDP's Human Development Report, 2006, Sub-Saharan Africa has been reported to be off the track of meeting the MDGs target, because it is the only region that has witnessed an increase both in the incidence of poverty and in the absolute number of poor. Some 300 million people there - almost half of the region's population - live on less than \$1 a day. While the world as a whole is on track for achieving the 2015 target of halving extreme income poverty, Sub-Saharan Africa is off track, as are many countries in other regions. See Human Development Report 2006, State of Human Development, pp. 8-9.

³⁸⁵ See Poverty Profile for Nigeria 2005.

<<http://www.nigerianstat.gov.ng/Connections/poverty/POVPreliminary.pdf>> accessed 20 May 2005.

³⁸⁶ See Emeka Anuforo, *President puts Nigeria's population at 150 million*, The Guardian, 18 May, 2007. <<http://odili.net/news/source/2007/may/18/39.html>> accessed 20 May 2007.

³⁸⁷ See Nigeria Poverty Profile 2005 page xv.

If we assume without conceding that the report is correct, it clearly indicates that poverty was higher in rural areas even in terms of food intake, as opposed to the claim of the former President. It must be stated that the former President himself had previously in 2001 attested to the mass poverty in Nigeria when he stated:

*'Democracy is about the freedom to choose, but a democratic society cannot be built when a large number of people are so poor that they are denied choices due to lack of opportunities to live a tolerable life, materially, psychologically, socially and culturally.'*³⁸⁸

The 2005 Poverty Profile and the argument of the former President were severely impugned during the fieldwork conducted in this work. Some of the people interviewed labelled the argument of the former President as purely political and not scientific. They argued that using the less than \$1 a day benchmark for the poverty rate should be regarded as generous considering the weak exchange rate of the country's currency.³⁸⁹ It was also contended that in the cities, a budget of \$3 a day would not even be appropriate, because of what it requires economically to stay in the cities and that this accounted for slums springing up in the cities, and the near life of destitution that people live in the cities.

The majority of the people interviewed claimed that when one looks at the pressure being brought to bear on the people in the urban centres and those living abroad, from their relatives in the rural areas, then one can appreciate how deep the level of poverty is in the rural areas. A foremost lawyer and human rights activist for instance claimed during the fieldwork that Nigerians abroad and those in the urban centres in Nigeria have to constantly send money to meet school fees and the other sundry needs of their relatives, provide shelter for their parents and to maintain them.

According to the said lawyer, most of the people in the rural areas are engaged in subsistence farming by manual means, and that this cannot be sufficient to make any meaningful income. He asserted that the reality in Nigeria was that the chain of poverty stretches from the rural areas to urban centres and abroad. Some other people also argued that the people in the rural areas lack access to safe drinking water, standard of living adequate for health and well-being, no access to health care, and the people often die from poverty-related causes.

Some other people interviewed were of the view that in actual fact, the population of Nigerians living in poverty put at 70 percent should actually be more than that, as they contended that the number of the poor keeps increasing and more people are dropping below the extreme poverty line by the day. In his own contribution, a former Justice of

³⁸⁸ See Chinua Asuzu and Odili G. Okonkwo (2002), *The Governance Scorecard 2002: A Review of Governance in Nigeria*, The Human Rights Law Service, Lagos p. 91.

³⁸⁹ For instance, as at May, 2006 US\$1 is equal to N133 Nigerian naira (NGN) at the official rate of exchange for US\$1, while N1 Nigerian naira (NGN) was equal to 0.007513 US Dollar (USD) compared to say in 1976 when N1 Nigerian naira was equivalent to approximately \$2; see Oanda.com, currency site <<http://www.oanda.com/convert/classic>> accessed 30 March 2007.

the Supreme Court of Nigeria stated that he was surprised that the figure was not more than 70 percent because according to him, most of the people we regarded as not poor are in fact poor. He made an analysis of young lawyers who earn a little more than \$1 a day in law chambers. He stated further that only a few private workers earn more than N4, 200 (approx \$34) a month in Nigeria and that anybody earning less than N10,000 (approx \$80) he would regard as poor. He therefore claimed that the figure for those living in poverty would be about 80 percent.³⁹⁰

Other people at different fora spoke in the same vein, contending that regardless of the parameter employed, about 80 percent of Nigerians are poor³⁹¹ if one has to take into consideration, basic necessities of life like housing, food, clothing, education and access to health facilities. For instance, some interviewees stated that to get accommodation in the cities, only a liberal landlord will demand a year's rent in advance, as the standard is now between two to three years rent, excluding legal and agency charges; while even in the rural areas, landlords now demand not less than a year's rent.

The views expressed by some of those interviewed have been confirmed by a recent 2008 World Bank report which indicated that 90 percent of Nigerians - 126 million are poor (living on less than \$2 a day). The report added that per capita Gross Domestic Product in Nigeria is behind other African countries such as Cote d'Ivoire, South Africa and Democratic Republic of Congo (DRC) among others.³⁹²

2.2 INDICES OF POVERTY IN NIGERIA

2.2.1 Poor human development index

Indices of poverty itself cannot adequately be explained without reference to human development, which may aptly be described as the improvement in the quality of human life, with the enjoyment of all human rights as its core and comprehensively spelt out in the UNDP Report for 2000 earlier referred to in this work. This is buttressed by the consequent Declaration on the Right to Development in 1986 by the UN.³⁹³ According to the UNDP, human development is about creating an environment in which people can

³⁹⁰ The argument of the eminent Jurist is logical because according to the World Bank Report: *Attacking Poverty for 200/2001* referred to above, the population of Nigerian living on less than \$2 a day was said to be 90.8 percent.

³⁹¹ A similar view was recently expressed by a group of youths based in Northern Nigeria, i.e. the Coalition of Northern Civil Society Organisation (NCSO), when they said 'more than 80 percent of the people are living below the poverty line' (Northern Youths' Group Backs Strike, see Saxone Akhaine, *Northern Youths' Group Backs Strike, Wants Sale Of Refineries Revoked*, The Guardian 23 June, 2007 <<http://www.guardiannewsngr.com/news/article06>> accessed 23 June 2007.

³⁹² This was credited to Mr. Ismail Radwan, a Senior Economist with the World Bank, at a conference on microfinance organized by the Central Bank of Nigeria in Abuja on 17 January 2008. See Atser Godwin, op. cit.

³⁹³ See Declaration on the Right to Development, G.A. Res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186. U.N. Doc. A/41/153 (1986)) According to the United Nations Development Programme (UNDP).

develop their full potential and lead productive, creative lives in accordance with their needs and interests.

It is thus about much more than economic growth, which is only a means, the core of which is about building human capabilities. The most basic capabilities for human development are to lead long and healthy lives, to be knowledgeable, to have access to the resources needed for a decent standard of living and to be able to participate in the life of the community. Without these, many choices are simply not available, and many opportunities in life remain inaccessible.³⁹⁴

It thus means that how generally accessible to the individual basic facilities and services are such as health care, housing, education, electricity, court and politics, i.e. through the ballot, are core ingredients of human development as indices of poverty. Human development has been said to share a common vision with human rights. The goal is human freedom, and in pursuing capabilities and realizing rights. Human development and human rights are mutually reinforcing, helping to secure the well-being and dignity of all people, building self-respect and the respect of others. Thus, the essential characteristics of human development are, greater access to knowledge, better nutrition and health services, more secure livelihoods, security against crime and physical violence, satisfying leisure hours, political and cultural freedoms and sense of participation in community activities.³⁹⁵

The evidence of poverty in Nigeria has been an issue of discussion in many reports and different fora within and outside the country. In a 1996 World Bank Poverty Assessment Report on Nigeria titled 'Nigeria: Poverty in the Midst of Plenty: The Challenge of Growth with Inclusion' the World Bank stated that 'Nigeria presents a paradox. The country is rich but the people are poor. Per capita income today is around the same level as in 1970.'³⁹⁶

A Nigerian eminent Jurist has corroborated the state of absolute poverty in Nigeria in his recent lecture when he stated that the very poor suffer from agonizing deprivation, hunger and starvation, suffering from a poverty that is sordid, graceless and miserable. According to him, added to this is the fever of inflation and the plague of unemployment and that what we have is a complete and vivid picture of utter wretchedness.³⁹⁷ With the

³⁹⁴ See What is Human Development, <<http://hdr.undp.org/en/statistics/faq/question,68,en.html>> accessed 15 April 2007.

³⁹⁵ Ibid.

³⁹⁶ See Nigeria - Poverty in the Midst of Plenty - The Challenge of Growth with Inclusion, A World Bank Poverty Assessment Report No. 14733 – UNI. Published May 1996, Executive Summary, p. 11

<http://www.wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/1996/05/31/000009265_3961029235646/Rendered/PDF/multi0page.pdf> accessed 10 December 2006; Nigeria's GDP per capita is (PPP US\$) \$1,128 (2005 estimate), which is too low for a resource rich country like Nigeria. <http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_NGA.html> accessed April 2008.

³⁹⁷ See Justice Chukwudifu Oputa (CFR), *Legal and Judicial Activism in an Emergent Democracy, the last hope for the common man?*, The Comet, Tuesday 2 March, 2004 p.32, being the text of the Lecture delivered at the Justice Chike Idigbe Memorial Lecture at the Faculty of Law, Obafemi Awolowo University, Ile-Ife on 8 January 2004.

above, poverty can appropriately be described as the ‘tsunami’ of Nigeria as more people are falling below the poverty line daily.³⁹⁸

The discussion groups of the world poverty assessment by the World Bank in *Voices of the Poor: From Many Lands*³⁹⁹ conducted in several countries including Nigeria, revealed the extent of poverty in Nigeria. The groups in their assessment averred that hardships have pulled everyone down and that even people who are comparatively well off are no longer able to help others as they used to.

The poor in Nigeria according to the above report stated that they lacked the ability to educate their children above primary school level, if their children receive education at all. They described the inability to meet basic needs, lack of adequate food, safe water and decent clothes, and an inability to afford medical care or obtain justice when wronged. They also expressed the lack of freedom and the fact that ‘many poor Nigerians skip meals and get by with extremely little to eat.’⁴⁰⁰ Their confessions attest to their very poor standard of living in Nigeria.

Two ways of measuring poverty according to the UNDP’s, poverty report,⁴⁰¹ are the \$1 per day, which is an income measurement of poverty measuring the percentage of people who live on less than \$1 per day, and the Human Poverty Index (HPI), which measures poverty by using indicators of most basic dimensions of deprivation, such as a short life, lack of basic education and lack of access to public and private resources.⁴⁰² The Human Poverty Index’s view is that a person is not free to live a long healthy and creative life if denied access to a decent standard of living, freedom, dignity, self-respect and the respect of others. This is because from a human development perspective, poverty is more than the lack of material well-being.⁴⁰³

This is measured by focusing on the following:

- the percentage of people expected to die before the age of 40
- the percentage of adults who are literate

³⁹⁸ See note 270 above and the different reports on widespread poverty in Nigeria as referred to above.

³⁹⁹ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. pp. 88, 89, 91 and 99.

⁴⁰⁰ Ibid p. 98.

⁴⁰¹ See UNDP Poverty Report 2000, *Overcoming Human Poverty*, <<http://www.undp.org/povertyreport/slides/slideindex.html>> accessed 20 March 2007.

⁴⁰² See UNDP, Human Development Reports- The Human Poverty Index (HPI) <<http://hdr.undp.org/en/statistics/indices/hpi/>> accessed 2 January 2007.

⁴⁰³ Ibid. The level of human poverty is measured by the Human Poverty Index (HPI) of the United Nations Development Programme (UNDP). The Human Poverty Index focuses on deprivation. The three basic elements of human life which are focused on by the Human Poverty Index (HPI) - longevity (health), knowledge and a decent standard of living, are also focused on by the Human Development Index (HDI). The Human development index (HDI) is a benchmark used by the UNDP to measure a country's average achievements in three basic aspects of human development: health, knowledge and a decent standard of living. Health is measured by life expectancy at birth; knowledge is measured by a combination of the adult literacy rate and the combined primary, secondary and tertiary gross enrolment ratio; and standard of living is measured by GDP per capita (PPP US\$).

- the percentage of the population without access to health services
- the percentage of the population without access to safe water
- the percentage of children under five who are underweight

The HPI-1⁴⁰⁴ value for Nigeria is 40.6, GDP per capita (PPP US\$)⁴⁰⁵ is 1, 154, (which is too low for a resource rich country like Nigeria) and ranks 76th among 102 developing countries for which the index has been calculated.

Nigeria has been consistently ranked near the bottom of the UNDP's Human Development Index, coming 148 out of 174 countries in 2002. The UNDP's Human Development Report 2004⁴⁰⁶ on Nigeria's position of the country on the Human Poverty Index is as follows:

- Probability of not surviving past the age of 40 (%) - 46.0
- Combined primary, secondary and tertiary gross enrolment ratio (%) was 55.0
- Life expectancy at birth was 43.3 (years)
- People without access to an improved water source (%) 52
- Children underweight for their age ((% ages 0-5) 29

⁴⁰⁴ The HPI-1 measures severe deprivation in health by the proportion of people who are not expected to survive the age of 40. Education is measured by the adult illiteracy rate. And a decent standard of living is measured by the unweighted average of people without access to an improved water source and the proportion of children under the age of 5 who are underweight for their age. The HDI measures the average progress of a country in human development terms. The Human Poverty Index for developing countries (HPI-1), focuses on the proportion of people below a threshold level in the same dimensions of human development as the Human Development Index - living a long and healthy life, having access to education and a decent standard of living. By looking beyond income deprivation, the HPI-1 represents a multi-dimensional alternative to the \$1 a day (PPP US\$) poverty measure. See Human Development Report 2006, Human Development Indicators, Country Fact Sheets- Nigeria <http://hdr.undp.org/hdr2006/statistics/countries/country_fact_sheets/cty_fs_NGA.html> accessed 11 October 2007.

⁴⁰⁵ Purchasing power parities (PPP) are the rates of currency conversion that equalize the purchasing power of different currencies by eliminating the differences in price levels between countries. In their simplest form, PPPs are simply price relatives which show the ratio of the prices in national currencies of the same goods or service in different countries. For example, if the price of a hamburger in France is 2.84 euros and in the United States it is 2.2 dollars, then the PPP for hamburger between France and the United States is 2.84 euros to 2.2 dollars or 1.29 euros to the dollar. This means that for every dollar spent on a hamburger in the United States, 1.29 euros would have to be spent in France to obtain the same quantity and quality - or, in other words, the same volume - of hamburgers. The major use of PPPs is as a first step in making inter-country comparisons in real terms of gross domestic product (GDP) and its component expenditure. GDP is the aggregate used most frequently to represent the economic size of countries and, on a per capita basis, the economic well-being of their residents. See Organisation for Economic Co-Operation and Development (OECD), Purchasing Power Parities (PPP), <http://www.oecd.org/faq/0,3433,en_2649_34357_1799281_1_1_1_1,00.html#1799063> accessed 10 April 2008. See also Report on the World Social Situation 1997 pp. 65-66.

⁴⁰⁶ See Human Development Report 2006, Human Development Indicators, Country Fact Sheets- Nigeria <http://hdr.undp.org/hdr2006/statistics/countries/country_fact_sheets/cty_fs_NGA.html> accessed 11 October 2007.

Nigeria's position on the Human Development Index for the 2004 Report was 159 out of 177 countries, while in the one for 2006, the country ranked 159th out of 177 countries.⁴⁰⁷

The 2006 data on Nigeria by the Organisation for Economic Co-operation and Development (OECD),⁴⁰⁸ showed a declining GDP per capita from (PPP US\$) 1,154 in 2004 to \$PPP1,070 in 2006. Also life expectancy witnessed little or no improvement from 43.3 (years) in 2004 to 44 (years) in 2006. These figures indicate no improvement in the standard of living of Nigerians generally, and are suggestive of the worsening plight of the poor. Poverty has been identified as being responsible for early death, as thousands of children and adults in Nigeria die from preventable diseases, while poverty is also linked with hunger and poor health.⁴⁰⁹ This was a result of the fact that hunger leads to exhaustion or weakness, which leads to illness and lack of access to health which leads to death.

According to former UN scribe Kofi Annan, about 130 million children around the world don't attend school, half of which live in Bangladesh, India, Ethiopia and Nigeria.⁴¹⁰ The widespread poverty in Nigeria, decay of public infrastructure which in most cases is non-existent and the fact that the country parades some of the worst basic social indicators in the world are glaring indices of poverty.⁴¹¹ The poor Human Development Index of Nigeria can be better appreciated when it is considered that in the World Bank Poverty assessment report of 1996 earlier referred to, per capita income at that time remained at the level it was in 1970. This means that for a period of 26 years, per capital income stagnated, with the consequences of a downward slide in the standard of living, ill-health and surge in diseases of poverty and widespread poverty.⁴¹²

Nigeria is the world's eighth-largest exporter of crude oil (OECD)⁴¹³ and the largest in Africa, and it is believed that before 1999 it had realized over US\$300 billion from the sale of crude oil, and the wealth of Nigeria has been reported to have enriched a small

⁴⁰⁷ See HDI Report 2004 <<http://hdr.undp.org/hdr2006/statistics/>> accessed 20 May 2007.

⁴⁰⁸ See The Organisation for Economic Co-operation and Development (OECD) 2007 Annual Report on Nigeria, p. 1 AEO 2007 - Nigeria country study <<http://www.oecd.org/dataoecd/27/18/38562978.pdf>> accessed 28 August 2007.

⁴⁰⁹ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November, 2006 p. 44.

⁴¹⁰ See K. Annan, *We The Peoples. The Role of the United Nations in the 21st Century*, UN, New York, 2001, p. 24, cited by Paschal Mihyo and Karin Arts, *Ibid*, p. 6

⁴¹¹ See Babatunde Omilola, *Trapped in Poverty: Poverty. Development and Democracy in Post-Military Nigeria*, at <http://h05.cgpublisher.com/proposals/552/index_html> accessed 20 August 2006.

⁴¹² Diseases like malaria, tuberculosis and AIDS account for nearly 18 percent of the disease burden in the poorest countries. They are regarded as diseases of poverty because they are avoidable or treatable with existing medicines and interventions. See Philip Stevens, *Diseases of poverty and the 10/90gap*, International Policy Networks, 2004 London, pp. 4 and 5.

<http://www.fightingdiseases.org/pdf/Diseases_of_Poverty_FINAL.pdf> accessed 10 April, 2008.

⁴¹³ See the Organisation for Economic Co-operation and Development (OECD), 2007 Annual Report on Nigeria, p. 7.

minority, while the vast majority is said to have become increasingly impoverished.⁴¹⁴ Nigeria's National Millennium Development Goals Report 2004 stated that the illiteracy rate was 57 percent, and the annual GDP growth rate in Nigeria during the last decade (i.e. as at 2004), has been relatively low, averaging about 3 percent, which is the average population growth rate, implying that welfare of the average Nigerian has not improved significantly. The report further stated that this explains why Nigeria is ranked among the poorest countries in the world.⁴¹⁵

According to the International Labour Organization African Regional Director, Mrs. Regina Amadi-Njoku 'ignorance is poverty, lack of money is poverty, lack of health is poverty, and lack of education is poverty'.⁴¹⁶ Poverty of parents has had adverse effects on children in Nigeria, with the result that more children now live and/or work in the street because of little or no attention from parents in feeding for them, which has increased their vulnerability to child labour, trafficking, abuses, exploitation and forced marriage.⁴¹⁷ The report of Ms. Lizin, the Independent Expert on human rights and extreme poverty indicated that the increase in prostitution is linked to poverty. She indicated that extreme poverty can be likened to exploitation, both sexual and physical (forced labour), of young girls from very poor backgrounds.⁴¹⁸

The Nigeria's Poverty Profile for 2005 referred to above, attests to the poverty situation in the country when it stated: 'the scourge of poverty on a significant proportion of the Nigerian Population has been charted in the past by a series of four Consumer Expenditure Surveys Implemented by the then Federal Office of Statistics: in 1960, 1985, 1992 and 1996. Over the 16-year period, the report of the surveys indicated that poverty was most widespread in the rural areas and also feminized.'⁴¹⁹

On inequality, the stated national Gini co-efficient⁴²⁰ is 0.4882, while those for urban and rural arrears are 0.5541 and 0.5187, respectively. The report further stated that the

⁴¹⁴ See Human Rights Watch, *The Price of Oil Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, New York 1999 p. 6.

⁴¹⁵ See Nigeria: MDGs Report 2004. <http://www.undg.org/documents/5430-Nigeria_MDG_Report_-_Annex_2__Poverty_Data.pdf> accessed 1 March 2006.

⁴¹⁶ See X, *Unemployment, poverty crises worsens despite NEPAD, NEEDS, says ILO*, The Guardian, 29 December 2006. <<http://odili.net/news/source/2006/dec/29/8.html>> accessed 30 December 2006.

⁴¹⁷ See OMCT/CLEEN (2004), *Rights of the Child in Nigeria* – Report on the implementation of the Convention on the Rights of the Child in Nigeria, Geneva, p. 7.

⁴¹⁸ See E/CN.4/1999/48 report of the independent expert on human rights and extreme poverty, pp. 30-31 paras 111 and 114.

⁴¹⁹ See Nigeria Poverty Profile 2005, Executive Summary p. 15.

⁴²⁰ The most widely used summary measure of the degree of income inequality between different groups of households in the population is the Gini coefficient. It represents an overall measure of the cumulative income share against the share of households in the population. The lower the value of the Gini coefficient, the more equally household income is distributed. See National Statistics, Measuring inequality in household income: the Gini coefficient. <http://www.statistics.gov.uk/about/methodology_by_theme/gini/default.asp> accessed 16 April 2008. The coefficient varies between 0, which reflects complete equality and 1, which indicates complete inequality (one person has all the income or consumption, while all others have none). One of the disadvantages of the Gini coefficient is that it is not additive across groups, i.e. the total Gini of a society is not equal to the sum of the Ginis for its sub-groups. See the World Bank, Poverty Net,

high figures at all levels are manifestations of poverty and inequality in the distribution of income.⁴²¹ On health the report has it that the status of health is a strong indication of human development and can also serve as an indicator for poverty. The survey result revealed that about 8.0 percent of the population consulted health care providers because of low level of awareness, poor facilities and high cost. Cost will often make health not accessible to the poor, even for those that are aware.⁴²²

On housing, the report states that the housing conditions of households can also serve as a proxy for welfare measurement. It stated further that about two-thirds (66.0 percent) of the households lived in single rooms, while about one-quarter (24.1 percent) of the households lived in whole buildings. The report added that 70 percent of the households used firewood as the main source of fuel for cooking, more than a quarter (26.6 percent) used kerosene, while only 1.1 percent used gas.⁴²³ This is the reality of the situation of things in Nigeria where more women and children spend valuable time in the farms/bush and around the community sourcing firewood and water. The use of firewood, charcoal, sawdust and kerosene in cooking also have health hazards mostly for women who are exposed to carbon monoxide fumes most of the time.⁴²⁴

In 1990, about 300,000 poor people and their families were forcefully evicted from their houses in Maroko, Victoria Island, Lagos by the then military government with the attendant disruption of the education of their children, and they were neither compensated nor given alternative accommodation. In other mass forced evictions in Makoko, Ijora Badiya and Oloye, over 4,000 people were made homeless without adequate notice, compensation or alternative accommodation.⁴²⁵ The state officials

<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html>> accessed 11 April 2008.

⁴²¹ See Nigeria Poverty Profile 2005, Executive Summary p. 15.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ It has been stated for instance that benzene is a major health hazard emitted from glowing charcoal, firewood and compounds emissions from food cooking. See Maria Olsson, & Goran Petersson, *Benzene emitted from glowing charcoal*, The Science of the Total Environment 2003 vol. 303 issue 3 pg. 215 – 220 at <http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6V78-476TNB0-6&_user=794998&_rdoc=1&_fmt=&_orig=search&_sort=d&view=c&_acct=C000043466&_version=1&_urlVersion=0&_userid=794998&md5=949f252166f4cbf714f49826d293a4f5> accessed 2 February 2008; also, acute respiratory infections, which are the leading cause of the global burden of disease, have been causally linked with exposure to pollutants from domestic biomass fuels in less-developed countries. A study from Kenya has shown this. See M. Ezzati, & D. Kammen, *Indoor air pollution from Biomass Combustion and acute respiratory infections in Kenya: an exposure – response study*, The Lancet, Vol. 358, Issue 9282, 29 September 2001 pages 619 – 624. <http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6T1B-43TPF8G9&_user=794998&_rdoc=1&_fmt=&_orig=search&_sort=d&view=c&_acct=C000043466&_version=1&_urlVersion=0&_userid=794998&md5=f5aeb3b7b490ff7ce73820446b3ee15e> accessed 2 February 2008.

⁴²⁵ See Social and Economic Rights Action Center (SERAC), *Makoko Under siege*, November, 2005, which reported some of the forced evictions and showed a picture of someone mercilessly beaten when resisting the forced eviction.

carrying out the forced evictions reportedly used tear gas, beat residents and in the process young children were injured.⁴²⁶

The poor in Nigeria in the *Voices of the Poor* also expressed the importance of education which they realized as a powerful tool of empowerment,⁴²⁷ as they regarded one's level of educational as a highly relevant factor to getting job opportunities. Participants were said to have blamed their inability to escape poverty on a lack of education. The most worrisome concern of the poor men and women in Nigeria according to the report is the unaffordable school fees and the unofficial fees, apart from bribes said to be associated with keeping their children in school. As a result of this, children have to engage in street trading and other odd jobs in order for the parents to raise money for school, buy uniform, books and other essential material in addition to feeding. For these reasons, 'schooling for many children is intermittent and delayed, or abandoned.'⁴²⁸

In Nigeria, quality of education in public schools has become a major concern. The poor people in their discussion with the World Bank group expressed worry concerning the low quality of education, which they said had become so as a result of teachers' lack of commitment, proper training, overcrowding in dilapidated buildings and lack of equipment.⁴²⁹ All the issues discussed above resonate with a poor Human Development Index in Nigeria.

2.2.2 High rate of criminality and rise in violent crimes

The high incidence of criminality and violent crimes have been attributed to poverty more than any other factor, although major causes have been given such as unemployment, social disadvantages, unequal distribution of resources and poverty.⁴³⁰ In most cases the poor have been associated with crime, as the majority of people

⁴²⁶ See Amnesty International, *Nigeria: Making the destitute homeless – forced evictions in Makoko, Lagos State* (AI Index AFR 44/001/2006)
<<http://web.amnesty.org/library/Index/ENGIOR410062006?open>> 10 March 2007 this is also the case in Ajegunle, Badiya and Ebute-Metta, all in Lagos.

⁴²⁷ In Nigeria, 'basic education is perceived as a vital support in poor people's lives.' A woman was said to have stated that the little education that she acquired was enabling her to keep proper financial records and has been a great strength to her and helped her "fight back any form of suppression. See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 101.

⁴²⁸ Ibid at p. 1000.

⁴²⁹ Ibid.

⁴³⁰ See Ehindero S.C. (1998), *The Nigeria Police and Human Rights*, Ehindero Press, Jos, p. 29 A link between poverty and crime has also been established in Britain. See Haralambos and Holborn, *Sociology: Themes and Perspectives*, HarperCollins Publishers, Fourth Edition 1995, p. 155.

awaiting trials for different crimes in Nigeria are the poor or are from a poor family background. This fact is even reflected in the report of the Independent Expert on human rights and extreme poverty when she noted that ‘extreme poverty causes many persons to fall foul of the law, and it is they who constitute the vast majority of the prison population. After having served their term in prison, the poorest remain there because they are unable to pay their fines.’⁴³¹

In Nigeria, crimes are on the increase, with many violent crimes, armed robbery and assassinations surging to unprecedented levels. Crime has become fragmented as the rates of victimization are high.⁴³² There was the touching story of insecurity of life in Nigeria reported in the year 2002 about one company being run by a German national in Lagos State Nigeria, who was reportedly leaving Nigeria to relocate in another West African country because of the level of crime. According to the report,⁴³³ the Managing Director of the company, one Mr. Bernhard Kreztofiak was said to have recounted his sad experience as follows:

‘I was attacked three times by armed robbers in the last two years...they took away about \$10,000. The cases were reported to the police, but nothing came of it. Then my wife was attacked in her car...three months later my whole family was attacked along Ikorodu Road and they were ready to stab my eight-month-old son. They took away everything...my wife later reported the incident to the police. The first thing the police were asking for was money before they could do anything. I decide to leave.’

Daily newspapers are replete with news of armed robbery attacks on banks, people in their homes or on the streets killing, maiming and raping their victims. They operate in large numbers.⁴³⁴ The rate of insecurity of lives and property is becoming increasingly alarming.

The immediate past Inspector General of Police (IGP) in Nigeria Mr. Sunday Ehindero, at his passing out parade gave startling statistics of crime in the country for two and a half years from 2005 to May, 2007, during which he served as the police chief. He disclosed that the police arrested a total of 6,506 armed robbery suspects and recovered 8,920 firearms and 216,333 rounds of ammunition. This was in view of the fact that the report did not include armed robbery suspects that escaped arrest and other forms of crime (without arms), stealing and pickpocketing, which are rampant. ‘When one adds

⁴³¹ See Second Report of the Independent Expert on human rights and extreme poverty, (E/CN.4/2000/52 of 25 February 2000) para 140.

⁴³² See Haralambos and Holborn, op. cit. p. 155.

⁴³³ See Daily Times of 9-15 September, 2002, discussed in The Human Rights Law Service, *The Governance Scorecard 2002*, HURILAWS, Lagos p. 79.

⁴³⁴ In a recent robbery incident in Sango, Ogun State Nigeria, 27 heavily armed robbers were reported to have attacked a church and raided four banks in the premises, killing two policemen in the operation. See Kunle Adeyemi, Sesan Olufowobi and Ademola Oni, *Robbers invade Canaanland*, The Punch, 1 February 2008, at <<http://odili.net/news/source/2008/feb/1/423.html>> accessed 2 February 2008.

to this, the large number of men and women engaged in touting ('agberos') and miscreants in all forms across the nation, the figures become alarming.⁴³⁵

Taking to crime has been blamed on poverty among other reasons.⁴³⁶ The *Voice of the Poor* also attests to poverty as a reason for going into crime, when a member of a discussion group in Sarajevo⁴³⁷ stated:

Criminality is a result of poverty. When you're hungry, you have to find a way. Hunger doesn't ask. —Discussion group participant, Sarajevo, Bosnia and Herzegovina.

Participants were also said to have confided in the World Bank group that 'sometimes desperation and hunger lead to antisocial and illegal activities. "A man loses his head with unemployment. He risks everything and gets the guts to do things he never thought he would," says a man from Sacadura Cabral, Brazil. For some, the conditions of their lives drive them to steal, drink, take drugs, sell sex, abandon their children, commit suicide, or trade in women and children. Poor people frequently report that sex work is an outcome of poverty, especially in Africa and Asia,⁴³⁸ and references to prostitution and the spread of HIV/AIDS are most common in Africa.⁴³⁹

2.2.3 Incessant civil unrest, inter-ethnic and religious strife

Since the country's return to democracy in May, 1999 Nigeria has witnessed a series of violent and bloody communal conflicts. From 1999 to 2002 alone, there were over 50 outbreaks of violent clashes and the preponderance of these bloody and fratricidal irrespective of the colour, were said to be rooted in poverty and unemployment.⁴⁴⁰ Militants in the oil-rich Niger-Delta have continued to kidnap foreign oil workers working with multi-national oil companies and Nigerians alike on a daily basis.⁴⁴¹ This made the government set up the Joint Military Task Force to crack down on the

⁴³⁵ See Olusola Fabiyi, *Why policemen are being killed-Ehindero*, The Punch, 2 June, 2007 at <<http://www.punchontheweb.com/Article.aspx?theartic=Art20070602183457>> accessed 2 June 2007.

⁴³⁶ A member of the gang of robbers specialized in robbing commuters in the Lagos metropolis, 27-year-old Samuel Gabriel, during their interrogation after arrest blamed widespread poverty as a major cause of crime in Nigeria, noting that many frustrated able-bodied men had resorted to robbery as an easy means of survival. According to him, bus robbery thrives because it is an easy business with immediate results. See Abiodun Nejo, *Reckoning day for two bus armed robbers, 'Why we chose army barracks to rob'* Saturday Punch, 11 June 2005 at <<http://odili.net/news/source/2005/jun/11/401.html>> accessed 11 June 2007.

⁴³⁷ See Narayan, Deepa, Robert Chambers, Meera Kaul Shah, and Patti Petesch (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 60.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ See OMT/CLEEN (2002), *Hope betrayed? – A report on impunity and State-Sponsored Violence in Nigeria*, Geneva, Lagos, pp. 9 and 11.

⁴⁴¹ See Emma Gbemudu, *Inequality in Niger Delta: Azaiki's panacea*, *Daily Independent*, 1 February 2008 at <<http://odili.net/news/source/2008/feb/1/705.html>> accessed 3 February 2008; Levi Obijiofor, *Niger Delta: Retreat, yes; surrender, no*, The Guardian <<http://odili.net/news/source/2008/feb/1/34.html>> accessed 3 February 2008; Ahamefula Ogbu, *Gunmen kidnap Lulu-Briggs' wife*, This day 7 February 2008 <<http://odili.net/news/source/2008/feb/7/213.html>> accessed 7 February 2008.

militants as a way of stemming the tide of violence in the Niger-Delta.⁴⁴² In the first four years following Nigeria's return to democratic rule in 1999, at least 10,000 people were killed in communal violence across the country.⁴⁴³

Mass poverty, particularly when combined with growing vertical or horizontal inequality, has been averred to often lead to social instability, and that the resulting law and order problems have an economic base but undermine civil and political rights. In other words, persistent poverty and growing inequality lead to social strife, which often undermines civil liberties.⁴⁴⁴

2.3 CAUSES OF POVERTY IN NIGERIA

2.3.1 Unemployment, irregular earnings, old age, etc.

Many factors have been given as responsible for poverty; immediate causes are low and irregular earnings, capitalism, unemployment and old age, loss of a breadwinner, ill-health, single parents and disability. The mapping of change in the immediate causes of poverty indicates that it is economic and structural factors and social misfortune, not individual weakness in the form of idleness or imprudence, which are the major causes of poverty.⁴⁴⁵

Low earnings can be a factor in poverty in Nigeria; for instance the national minimum wage in Nigeria is N7,500 (approx. \$60) per month. During the fieldwork in Nigeria, some of the people interviewed made reference to the fact that despite the low wages being paid, government and their establishments do not pay the minimum wage, and that in most cases workers are paid N5,500 (approx. \$344). In this type of situation, it was contended that workers are unable to earn enough to lift themselves and their households above the poverty line. As a result of this it was argued that a large number of the employed in Nigeria belong to the category of the 'working poor'. Some of the people interviewed also drew attention to the fact that the minimum wage, which was N1,500 (approx. \$12) per month before it was reviewed upwards in the year 2001, was ridiculously low. It was further argued that despite the seeming increase in the minimum wage, the inflationary trend has robbed people of the expected gains from this.

The low income poverty induced factor was corroborated by the ILO estimates in 2003 which indicated that a total of 1.39 billion people or 49.7 percent of the world's workers were unable to lift themselves and their families above the poverty threshold of US\$2

⁴⁴² See Social and Economic Rights Action Center (SERAC) (2005), *Perpetuating poverty, Consolidating Powerlessness: Oil and the Niger Delta*, SERAC, Lagos, pp. xii, 9-14, 19, 38, 46; Civil Liberties Organisation (2002), *Blood Trial- Repression and Resistance in Niger Delta*, CLO, Lagos; Committee for the Defence of Human Rights (CDHR) (2000), *Boiling Point*, A publication on the Crises in the Oil Producing Communities in Nigeria, CDHR, Lagos.

⁴⁴³ See Dan Isaacs, *Analysis: Behind Nigeria's Violence*, BBC online
<<http://news.bbc.co.uk/2/hi/africa/1630089.stm>> accessed 30 August 2007.

⁴⁴⁴ See UNDP, Human Development Report 2000, op. cit. p. 61.

⁴⁴⁵ See Gordon Marshall (ed) (1998), *Oxford Dictionary of Sociology*, Oxford University Press p. 518.

per day. It was said to be striking, that nearly one in four workers in the developing world (23.3 percent) were living on less than US\$1 per day (ILO, 2005). The majority of workers with very low incomes are likely to be found in the informal economy, where average wages are lower. Not all workers in the informal economy were said to be among the working poor, but it was added that an estimate of the working poor can be viewed as an approximation of those working in the informal economy whose earnings are very low (ILO, 2005).⁴⁴⁶

The problem of high levels of inequality has been described as an important challenge constraining poverty reduction in many African countries. Indeed, a 2006 UN report⁴⁴⁷ stated that empirical evidence suggests that high inequality substantially reduces the rate at which growth is transformed into poverty reduction. Inequality was said to manifest itself in various forms: income inequality, asset inequality, and inequality in access to education, health services and labour markets.⁴⁴⁸ This description typifies the above position of inequality in Nigeria as revealed in this work.

The need to bridge the ever widening gap of inequalities in society in order to reduce poverty has been emphasized and that the principle of equality itself is a function in law.⁴⁴⁹ The majority of those with low incomes in Nigeria live in absolute poverty because of insufficient earnings and in most cases they even have to cater for unemployed family members, dependants, such as aged parents, children and even friends, in the absence of unemployment benefits or social security. This often results in the majority being structurally poor when they are trapped in the cycle of poverty, and all efforts to break out of the poverty cycle are undermined by several other conditions of poverty which feed on themselves and create further conditions of poverty. It has been said that the poverty trap framework is helpful as it reinforces the basic fact that poverty is not the fault of the poor and it underscores the fact that escape from the trap is possible.⁴⁵⁰

The UN in the Millennium Development Goals Report 2008 has also stated on the issue of low income for instance that 'the poor are not the only those with the lowest incomes

⁴⁴⁶ See Department for Economic and Social Information and Policy Analysis: The Inequality Predicament - Report on the World Social Situation, 2005 p. 32.

⁴⁴⁷ The UN Economic and Social Council, Overview of the Economic Report on Africa 2006: "Recent economic trends in Africa and prospects for 2006" p. 8.
<<http://daccessdds.un.org/doc/UNDOC/GEN/N06/328/19/PDF/N0632819.pdf?OpenElement>> accessed 16 May 2007.

⁴⁴⁸ In a just-released UN progress report on the Millennium Development Goals which can be said to capture the real picture in Africa describes the challenges as "staggering". It stated that although the global incidence of extreme poverty declined between 1990 and 2002, in sub-Saharan Africa another 140 million people entered that category, the report pointed out. Some 44 percent of the region's population now lives in extreme poverty, classed as surviving on less than \$1 a day. This is a gloomy report. See Economic Commission for Africa, *Has Gleneagles brought Africa closer to meeting the MDGs?*, at <<http://www.uneca.org/mdgs/Story4july06.asp>> accessed 16 May 2007.

⁴⁴⁹ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November, 2006 pp.45- 47.

⁴⁵⁰ Ibid.

but also those who are the most deprived of health, education and other aspects of human well-being. Poor mothers are more likely to die in childbirth; children of the poor families are more likely to be malnourished and are correspondingly more susceptible to early death from childhood diseases; poor children receive less education and some may receive none at all; and gender imbalances are more pronounced among the poor, excluding them from recognized development benefits and opportunities. These characteristics, in turn perpetuate income poverty.⁴⁵¹

Poverty can also occur as a result of being passed from generation to generation. The Special Rapporteur on human rights and extreme poverty, in his final report indicated that 'poverty is often passed down from generation to generation making it increasingly difficult to escape. The tendency for poverty to perpetuate itself creates a vertical vicious circle of poverty. The two circles form a kind of infernal mill that strips people of any real opportunity to exercise their human rights and take on responsibilities.'⁴⁵² In other words, poverty or inequality can also have roots in circumstances of birth, for instance being born to rich, affluent or 'well-endowed parents creates enormous advantages' while being born to poor parents can make it extremely difficult to break the cycle of poverty,⁴⁵³ especially in a country like Nigeria without provision for social assistance.

Being born to poor parents may result in the children or the poor not being able to attend school or drop out of school, and even when they learn a trade, they cannot set up their own businesses or trade due to non-availability of capital, which further widens economic and educational differences.⁴⁵⁴ Ms. Magdalena Sepúlveda Carmona, the Independent Expert on the question of human rights and extreme poverty has equally corroborated the above by stating that poverty in childhood is also a root cause of poverty in adulthood.⁴⁵⁵

2.3.2 Corruption

The long years of military rule in Nigeria has been regarded as a colossal contribution to the high level of poverty in Nigeria, because their regimes were unaccountable, they were corrupt and institutionalized corruption in the country.⁴⁵⁶ The military and their

⁴⁵¹ UN (2008), The Development Millennium Goals Report, New York, p. 5.

⁴⁵² See Mr. Leandro Despouy, Special Rapporteur on human rights and extreme poverty, his final report published in 1996 (E/CN.4/Sub.2/1996/13), para. 8.

⁴⁵³ See Weinstein, Jack B, *The Poor's Right to Equal Access to the Courts*, 13 Conn. L. Rev. 651 (1980 – 1981) p. 654.

⁴⁵⁴ See Weinstein, Jack B., op. cit. 654.

⁴⁵⁵ See Her Interim report A/63/274 of 13 August 2008 p. 13 para 37.

⁴⁵⁶ Nigeria was regarded as a byword for misrule and corruption under military rule. For instance, at Ajaokuta steel works construction started 20 years before the return to civilian rule in 1999 and is still not finished. It has cost Nigeria billions of dollars and it has never produced a single piece of steel. It

collaborators were believed to have massively looted the nations' treasury and stashed the stolen money in foreign banks.⁴⁵⁷ It is generally believed that corruption has created undue bureaucracy in government establishments breeding inefficiency.⁴⁵⁸

Major acts of corruption in public office have been attributed to past military regimes in Nigeria. For example, the sum of \$2.8 billion oil money was declared missing during the military regime of General Olusegun Obasanjo in 1978, while during the regime of Gen. Ibrahim Babangida, an estimated \$12.4 billion (Gulf War I oil windfall) was said to have disappeared from the Central Bank of Nigeria (CBN) between 1988 and 1994.⁴⁵⁹ Also, an estimated \$6 billion was believed to have been stolen by the late military ruler, General Sanni Abacha, out of which about \$505.5 million was recovered from Swiss Banks and returned to the Nigerian government.⁴⁶⁰ In fact, Gen. Abacha and his family were said to have operated 41 accounts in different banks in Switzerland alone.⁴⁶¹ A total sum of over \$1.3 billion was said to have been so far recovered from the late head of state.⁴⁶²

In the last 20 years preceding 1999 when Nigeria returned to democratic governance, it was estimated that the country had lost over US\$75.18 billion to corruption, out of which US\$65 billion was believed to have been transferred abroad.⁴⁶³ This amount was twice the total of Nigeria's external debt of about US\$30 billion as at 1999.⁴⁶⁴ Also, according to the United Nations office on Drugs & Crimes (UNODC) in Nigeria, Nigeria was believed to have lost over \$1 trillion to corruption.⁴⁶⁵ The Nigerian Institute of Management (NIM) has stated recently that Nigerian leaders since independence have stolen \$480 billion from the treasury through corruption.⁴⁶⁶

was said that nobody will ever know how much money has been diverted from this ill-fated project into private pockets. See BBC News, *World: Africa, Nigeria confronts corruption*, Thursday, 11 November 1999 <<http://news.bbc.co.uk/2/hi/africa/515788.stm>> accessed 20 January 2007.

⁴⁵⁷ See Civil Liberties Organisation, *Annual Report, 2000 on the State of Human Rights in Nigeria*, Lagos, pp. 26-27; the external reserve of Nigeria was depleted by more than \$2.7 billion within three months by the Gen. Abdulsalam Abubakar regime.

⁴⁵⁸ See Zero Corruption Coalition, *Citizens Handbook on Independent Corrupt Practices Commission (ICPC) and Economic and Financial Crimes Commission (EFCC)*, September 2006 p. 9.

⁴⁵⁹ A matter initiated in 1992 and still pending at a Federal High Court, Lagos in which a lawyer and human rights activist-Chief Gani Fawehinmi (SAN) has sued the former military dictator, General Ibrahim Babangida & four others seeking to compel them to account for the \$12.4 billion oil money. See Davidson Iriekpen, *Gani vs IBB: Court rules on oil windfall suit June 17*, *This Day*, 6 May 2008 at <<http://odili.net/news/source/2008/may/6/220.html>> accessed 6 May 2008.

⁴⁶⁰ See Damilola Oyedele, *Switzerland: we've returned all Abacha loot*, *This Day*, 5 June 2008. <<http://odili.net/news/source/2008/jun/5/215.html>> accessed 5 June 2008.

⁴⁶¹ See Civil Liberties Organisation, op. cit. pp 26 – 27.

⁴⁶² See Damilola Oyewole, op. cit.

⁴⁶³ See Zero Corruption Coalition, op. cit. p. 9.

⁴⁶⁴ See Levi Anyikwa, *Masari seeks experts' help to recover stolen funds*, *The Guardian*, 11 November 2003 p. 3; The Human Rights Law Service (2005), *Controlling Endemic Corruption in Nigeria*, HURILAWS, Lagos.

⁴⁶⁵ See Clement Idoko, *Nigeria loses \$1 trillion to corruption- UN*, *Nigerian Tribune*, 6 December 2006 <<http://www.tribune.com.ng/06122006/news/news4.html>> accessed 20 December 2006.

⁴⁶⁶ Sylvester Enoghase, *Nigeria Leaders have stolen \$480 billion, says NIM Daily Independent*, Friday, 10 November 2006.

Since the country's return to democracy in 1999, despite the sustained efforts of the government of former President Olusegun Obasanjo to fight corruption, corruption is still widespread although an impressive record has been recorded in the anti-corruption crusade.⁴⁶⁷ This effort must have improved the country's rating in the world's corruption perceptions index, as the country is now 18 places above Haiti in the 2006 Transparency International corruption ratings, which adjudged Haiti to be the most corrupt place in the world.⁴⁶⁸ Several people, especially government officials and politicians, including a former police chief have been indicted and convicted for corruption.⁴⁶⁹ As at May 2008, seven former governors are currently standing trial for corruption and money laundering charges, while two more are to be arraigned in court after the anti-graft agency has completed investigations into the allegations against them. One former governor has already been convicted and jailed for money laundering.⁴⁷⁰

In April 2008, Nigeria's anti-graft agency, the Economic & Financial Crimes Commission (EFCC), revealed that within the past five years it has recovered over \$500 billion in cash and property, while 250 people have been convicted and over 1,000 cases are pending in various courts. The daily rate of corruption complaints being lodged with the agency is put at about 300.⁴⁷¹ For four consecutive years, 2001-2004, Nigeria was adjudged as the second most corrupt country in the world, according to the annual corruption index released by the Berlin-based organization Transparency International (TI).⁴⁷²

<http://www.efccnigeria.org/indez.php?option=com_content&task=view&id=1098&Itemid=2> accessed 6 May 2007.

⁴⁶⁷ This has been acknowledged internationally. See Remi Emeka Njoku, *World Bank President Praises Nigeria's anti-corruption campaign*, *Businessday*, 5 January 2007.

<http://www.efccnigeria.org/index.php?option=com_content&task=view&id=1169&Itemid=2> accessed 10 April 2007; Collins Edomanise, *The US expressed satisfaction with Nigeria's strides in the fight against corruption and related offences*, *This Day* 13 April 2006.

<http://www.efccnigeria.org/index.php?option=com_content&task=view&id=864&Itemid=2> accessed 10 April 2007; the FATF has equally acknowledged the good progress made by Nigeria in combating money laundering, see FATF Annual Report 2006 – 2006 p. 5 <<http://www.fatf-gafi.org/dataoecd/38/56/37041969.pdf>> accessed 20 February 2007.

⁴⁶⁸ See Transparency International, *Corruption Perceptions Index 2006*.

<http://www.transparency.org/policy_research/surveys_indices/cpi/2006> accessed 1 April 2007.

⁴⁶⁹ In November 2005 a former Inspector-General of Police was convicted on an eight-count charge relating to theft of more than \$100 million of public funds while in office. See Michael Peel (2006), *Nigeria-Related Financial Crime and its Links with Britain*, an Africa Programme Report, Chatham House, London, p. 47.

⁴⁷⁰ Those standing trial are Joshua Dariye of Plateau State; Saminu Turaki of Jigawa; Chimaroke Nnamani of Enugu; Jolly Nyame of Taraba; James Ibori of Delta; Orji Uzor Kalu of Abia and Lucky Igbinedion of Edo State. Diepreye Alamieyeseigha of Bayelsa State has been convicted and jailed for money laundering. See Yemi Adebawale, *EFCC to arraign two more ex-govs*, *This Day*, 10 May 2008 at <<http://odili.net/news/source/2008/may/10/213.html>> accessed 12 May 2008.

⁴⁷¹ The EFCC was reported to have made the revelations at an event celebrating its five years of establishment. See Dayo Thomas, *EFCC prosecutes 250, recovers \$500bn*, *This Day*, 4 April 2008 <<http://odili.net/news/source/2008/apr/11/211.html>> accessed 11 April 2008.

⁴⁷² See Transparency International, *Corruption Perceptions Index* <http://www.transparency.org/policy_research/surveys_indices/cpi> accessed 13 July 2007.

Corroborating the above position, in his address at the opening ceremony of the 24th African Parliamentary Union (APU), held in Abuja in October, 2001, former President Olusegun Obasanjo identified corruption as the major factor responsible for Africa's woes and mass poverty. He stated, *'Contrary to some schools of thought that reported global recession as the factor responsible for our poor continents poor economic showing over the year, a major and perhaps the root cause of its economic malaise is corruption'*.⁴⁷³

An author commenting on the endemic poverty and obscenity of wealth in Nigeria stated thus:

*"Despite its abundance of natural and human resources, Nigeria remains desperately poor. At the top end of the scale, some 1-2% of the population are filthy rich; namely government officials and industry heads who have acquired great wealth from the rich pickings of corruption."*⁴⁷⁴

In the current year 2008, the National Assembly started a probe of some of the projects awarded/executed by the last civilian administration in Nigeria and the revelations of monumental corruption emanating from the same are so mind boggling that the Attorney-General of the Federation and Minister of Justice, Chief Michael Aondoakaa, was reported to have remarked as follows:⁴⁷⁵

"...we are confronted daily by embarrassing and shameful revelations on corruption. It is a sad reality of our recent past, that the country was plundered mercilessly and without regard to decency, morality and fear of God by political office holders and other categories of public officers. Their past time was to unjustly and unjustifiably enrich themselves at the expense of the tax payers. This was the situation, despite the presence of EFCC and ICPC endowed by law with the enormous powers of the octopus, to fight corruption".

These various acts of wanton corruption, unbridled extravagance in public and bad governance have snowballed into misery and poverty for millions of Nigerians more than anything else, when they ought to be living a life of dignity on account of the huge oil revenues which have accrued for decades.⁴⁷⁶ It is without doubt that as evident from the *Voices of the Poor*, it is the poor that suffer the effects of corruption and bad governance most, as public institutions remain inaccessible to them either for the

⁴⁷³ See The Human Rights Law Service, *The Governance Scorecard 2002*, op. cit. p. 94.

⁴⁷⁴ See Lizzie Williams (2005), *Nigeria: The Bradt Travel Guide*, The Globe Pequot Press Inc, Connecticut, p. 41.

⁴⁷⁵ See Abel Orih Idoma, Aondoakaa: *Obasanjo was selective in anti-graft war*, This Day 16 May 2008 <<http://odili.net/news/source/2008/may/16/211.html>> accessed 16 May 2008.

⁴⁷⁶ See Emeka Anuforo, *Past govts mismanaged oil revenue, says Okonjo-Iweala*, The Guardian, 30 November 2004 back page; Segun Olatunji, *Our leaders are corrupt-Ribadu*, The Punch, 19 July 2006 p. 7; X, *No big deal in amassing wealth while in office – Alamieyeseigha*, Vanguard, 17 March 2007. <<http://www.odili.net/news/source/2007/mar/17/300.html>> accessed 18 March 2007.

enforcement of rights or in accessing services that ordinarily ought to be provided by government.

Some of the group of poor Nigerians interviewed in the *Voice of the Poor* gave credence to the high level of official corruption when they were reported to have stated:

*"We are too poor to do anything, and secondly, there is enough money to go round the country and make life worth living, but corrupt practices do not allow us to share in the national wealth."*⁴⁷⁷

Some other detrimental effects of corruption on the lives of those living in poverty are the reduction of their income, distortion of policies, programmes and strategies that aim at providing basic amenities and poverty reduction programmes.⁴⁷⁸

2.3.3 Lack of good governance

Nigeria like many of its African sisters⁴⁷⁹ has been unfortunate with leadership and this problem has been besetting the country since its independence. The political leaders are those who do not have the welfare of the populace at heart and this has resulted in the mass poverty in Nigeria. There have been no conscious efforts by successive administrations in the country to fashion programmes and policies that will improve the living conditions of the poor. Governments have designed harsh economic policies and these have been implemented in a manner that has led to massive social dislocation for the poor.⁴⁸⁰

There is high income inequality as indicated by Nigeria's 2005 Poverty Profile earlier referred to, asset inequality, and inequality in access to education, health services and labour markets.⁴⁸¹ This situation has been aided by an unbridled privatization of public enterprises, which in most cases has been to the benefit of a few individuals.

Government policy has not been too favourable to the poor in Nigeria. This includes the removal of the subsidy for petroleum, fertilizers and privatization. For example governments too often increase the prices of petroleum products, which increased the

⁴⁷⁷ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 91.

⁴⁷⁸ See A/63/274 of 13 August 2008 Interim report of Ms. Magdalena Sepúlveda Carmona, Independent Expert on the question of human rights and extreme poverty, p. 11.

⁴⁷⁹ See for example, the World Bank 2006 World Governance Indicators, covering year 1996-2005 with the six measurements of political stability/no violence, government effectiveness, regulatory quality, voice/accountability, rule of law and control of corruption, most African countries have a poor record. See WGI 2006: Worldwide Governance Indicators, World Bank.

<http://info.worldbank.org/governance/kkz2005/sc_chart.asp> accessed 13 August 2007.

⁴⁸⁰ In 1986 the Federal Government introduced the Structural Adjustment Programme (SAP) which emphasized reduced government spending and withdrawal of subsidies from basic social services, like health and education, and increased prices of petroleum products. It has had a cost push on other goods and services in Nigeria with a debilitating effect on the poor.

⁴⁸¹ See The UN Economic and Social Council, Overview of the Economic Report on Africa 2006, op. cit. p. 8.

burden on the poor in Nigeria, as this frequently translates into high cost goods and services, which affect the poor most, worsening their already poor living standards.⁴⁸²

The last fuel price hike was effected by the former President Olusegun Obasanjo on the eve of the expiration of his term of office, on 28 May 2007. Petroleum which is an essential product for transportation in Nigeria was N20 (approx. \$0.16) per litre in 1999 when Obasanjo came to power and was increased at different times to N75 (approx. \$0.60) in 2007 which was the seventh time since 1999, before the current President, Musa Yar'Adua reduced the price to N70 (approx. \$0.56) per litre, after a series of strikes and protests.⁴⁸³

The income of most Nigerians is static or marginally increased but not in a corresponding manner as with the frequent fuel price increases.⁴⁸⁴ The perennial increases in fuel price always result in cost-push inflation by causing an immediate rise in the cost of living across the board, with food prices and transport fares rising by as much as 50 to 80 percent, thereby inflicting hardship on the common man.⁴⁸⁵

In the *Voices of the Poor*, some of the Nigerian poor framers interviewed indicated that distant markets and poor transportation infrastructure contributed to their poverty as a result of their inability to transport their produce to market on time, loss due to deterioration and having to pay high transport cost.⁴⁸⁶ Increases in the price of petroleum products affect the poor most. The high costs of transportation severely affect children of the poor having to attend school in distant places from their villages or other locations resulting in having to trek long distances, to get to school. This results in irregular school attendance occasioned by weather conditions.

High cost of transportation also makes accessing health or other social facilities difficult for the poor who live mostly in the rural areas and even in the urban centres, which they have to access by taking a long walk.⁴⁸⁷

In Nigeria, communities especially in the rural areas lack basic infrastructure like water, health facilities, electricity, roads, schools and where there are schools, not enough teachers or none at all. The poor in Nigeria in the *Voices of the Poor* were reported to have stated that poverty is about access and consumption of State-provided

⁴⁸² See May Ifeoma Nwoye, *Privatization of Public Enterprises in Nigeria: The Views and Counterviews*, Journal of Political Theory and Research on Globalisation, Development and Gender Issues, <http://www.globalizacija.com/doc_en/e0062pri.htm> accessed 20 January 2008; Otiye Igbuzor, *Privatisation In Nigeria: Critical issues of concern to civil society*, being a paper presented at a power mapping roundtable discussion on the privatization programme in Nigeria organized by Social Economic Rights Initiative (SERI) held at Niger Links Hotel Abuja on 3 September 2003 <<http://www.dawodu.com/otive2.htm>> accessed 10 January 2008.

⁴⁸³ See X, *History of fuel hike in Nigeria*, The Guardian 22 June 2007 <<http://odili.net/news/source/2007/jun/22/29.html>> accessed 22 June 2007.

⁴⁸⁴ See Shima K. Gyoh, "The Role of Poverty in the Prevention of Diseases", D.A. Guobadia and Epiphany Azinge (eds) (2004), *Poverty the Nigerian Economy and the Law*, NIALS Press, Abuja p. 177.

⁴⁸⁵ See Civil Liberties Organisation (2004), *Clear and Present Danger*, CLO, Lagos p. 316.

⁴⁸⁶ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 86.

⁴⁸⁷ Ibid.

commodities. They emphasized the importance of key services such as roads, transportation, water, electricity, health care and marketplaces.⁴⁸⁸ Teachers and health workers were said for example to hardly ever accept postings to the villages, which often lack good roads and when they do accept, they go irregularly.⁴⁸⁹ The lack of access to drinking water for example makes the poor (especially women and children) spend the most part of the day trying to source water from streams or hand-dug wells. In some communities in Nigeria, the struggle for drinking water from wells often results in scuffles between people.⁴⁹⁰

The Vision 2010 Committee set up by the military regime of the late ruler General Sanni Abacha, in its report gave a vivid description of the very poor quality of life in the rural areas of Nigeria as follows:⁴⁹¹

'Nigeria is largely a rural country, with 62 percent of her population living in the rural areas. But the quality of life is very poor amongst this large population, due mainly to extreme inadequate infrastructure, lack of employment opportunities and social amenities. Health care is poor, and this is compounded by the lack of access to potable water. Educational facilities are insufficient and dilapidated, access to land for agriculture is limited and where available, productivity is low due to poor technology and lack of input. Road network, communications facilities and markets are poorly developed. These accounts for the continuing poor quality of life in the rural areas in spite of an array of programmes aimed at development.'

Some of the participants in the *Voice of the Poor* in Nigeria were said to have also complained about inaccessibility to public, private and civil institutions save for a few. They claimed that most of the institutions of government are corrupt and exclude or abandon poor people from information on government policies, programmes of assistance, on their rights, etc.⁴⁹² They were also said to have claimed that the declining economic downturn in the country is caused by bad governance and mismanagement of public funds and was responsible for the lack of infrastructure in the communities.⁴⁹³

Most importantly, the poor were also said to express a lack of access to the judiciary and that they are too afraid of the police to seek assistance. Public institutions therefore seem to have no relevance to the poor as a result of bad governance thus resulting in exclusion, discrimination and corruption.⁴⁹⁴ Bad governance breeds corruption, makes

⁴⁸⁸ See Narayan, Deepa, et al. (2000), *Voices of the Poor: Can Anyone Hear Us?* p. 37.

⁴⁸⁹ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 86.

⁴⁹⁰ See Narayan, Deepa, Robert Chambers, Meera Kaul Shah, and Patti Petesch (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 74.

⁴⁹¹ See Federal Government of Nigeria (1997), *Vision 2010 Committee Report*, p. vi cited in Etannibi E.O. Alemika, Poverty, "Social Exclusion and Social Dislocation in Nigeria, in Poverty", in D.A. Guobadia and Epiphany Azinge (eds) (2004), *The Nigerian Economy and the Law*, op. cit. p. 119.

⁴⁹² See Narayan, Deepa and Patti Petesch (2002) *Voices of the Poor: From Many Lands*, op. cit. p. 91; see Narayan, et al. (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 274.

⁴⁹³ Ibid.

⁴⁹⁴ See Narayan, Deepa with Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch-Schulte (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 65.

equal access and fair treatment from the State impossible for the poor and the excluded, and accelerates their disengagement from wider society.⁴⁹⁵

Furthermore, the poor in Nigeria were recorded to have expressed difficulty in accessing government documents or processing documents in government offices. They have to pay bribes with money they often don't have to get documentation done, apart from official fees and loss of time owing to bureaucracy. They also complained of humiliation at the hand of public officials, and without some of these documentations, it might be difficult to claim some rights, so the poor are rendered vulnerable in public offices to abuse, compounded by government rules and regulations which are incomprehensible to them. Many poor people who are holders of government required documents were said not to understand or be able to read them on account of illiteracy.⁴⁹⁶

The poor were also said to have blamed the high rate of unemployment,⁴⁹⁷ even for the educated, which they attributed to bad government policies and bad leadership in Nigeria. The poor were said to have referred to the government's apathy towards development, unemployment and non-payment of salaries of government workers when due.⁴⁹⁸

Corroborating bad governance in Nigeria and its causal link to poverty, a foremost Jurist in Nigeria once stated that:⁴⁹⁹

'First we must unfortunately admit that poverty has become institutionalized by our system of political administration...It may of course be argued that 'poverty' is a relative term, but I do hope that no one can argue that a person who is existing at or very near starvation level as millions of our people do is not suffering from poverty. Obviously we have had poor people within our society from time immemorial. But the institutionalization of poverty is a matter of more recent origin concretizing itself after independence. Each successive ruling political group has supplied fertilizer and adequate water for the successful germination of the institution of poverty'.

With bad governance, 'what emerges is corruption and domination of public institutions by the powerful and rich, with little apparent accountability to anyone'.⁵⁰⁰ The poor are thus isolated physically from the rich and the powerful.⁵⁰¹ The situations of exclusion of

⁴⁹⁵ Ibid at p. 192.

⁴⁹⁶ See Narayan, Deepa, Robert Chambers, Meera Kaul Shah, and Patti Petesch (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 208.

⁴⁹⁷ The Vision 2010 Committee earlier referred to in its report on unemployment as follows: '...unemployment has reached a very alarming proportion in Nigeria, with a greater number of the unemployed being primary and secondary school leavers and university graduates. This situation has recently been compounded by the increasing unemployment of professional such as bankers, engineers and doctors.' See Vision 2010 Committee Report, p. vii cited in Etannibi E.O. Alemika, op. cit. p. 118.

⁴⁹⁸ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 91.

⁴⁹⁹ See Hon. Dr. T. Akinola Aguda (1987), *The Jurisprudence of Unequal Justice*, A Foundational Lecture delivered at the Lagos State University, on Monday, 12 January p. 4.

⁵⁰⁰ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 186.

⁵⁰¹ Ibid at p. 237.

the poor have resulted in the poor feeling isolated. In the *Voices of the Poor*, some of these views have been expressed as follows:⁵⁰²

‘No one cares about us. We have no rights whatsoever.
—Men’s discussion group, Krasna Poliana, Bulgaria’

‘People place their hopes in God, since the government is no longer involved in such matters. —Armenia 1995’

‘Poverty is lack of freedom, enslaved by crushing daily burden, by depression and fear of what the future will bring. —Georgia 1997’

The poor’s feeling of having no right or freedom must have emanated from powerlessness and the inability to take control of their lives. The fear of the police of the poor in Nigeria is the result of abuses suffered at the hand of law enforcement agents, especially the police. The *Voice of the Poor* reflected the position in Nigeria,⁵⁰³ where it was stated that in all the discussion groups, that illegal arrests, intimidation, extortion, corruption and police abuses are widely mentioned. The group from one of the communities in Nigeria was said to have declared that police are more interested in extortion than protecting the poor and engage in the practice of extorting money before suspects are released. The group was said to have recounted the fact that the poor are often not able to pay bribes demanded by the police owing to their inability to work as a result of detention and that in some cases, victims are constrained to sell off a valuable item in order to raise money for the bribe.⁵⁰⁴

During the fieldwork on this project, some of the people interviewed, including the then personal assistant to the Attorney-General of the Federation and Minister for Justice (a Professor of Law), stated in clear terms that police worsen the poverty situation in Nigeria through their illegal arrests and long detention periods, against the provisions of the Constitution. He added that the loss of earnings during the time of detention and having to pay bribes before being released exacerbates poverty. One of the implications of poverty on human rights has been said to be powerlessness, as ‘the poor pay a bigger share of their incomes in bribes, sometimes have little choice in their employer or terms of work, are often excluded from public services and the ability to participate in the public sphere, and are vulnerable to violence.’⁵⁰⁵

The Independent Expert on human rights and extreme poverty also acknowledged the important role of police as part of a local approach to reduce poverty. The Independent Expert was said to have noticed during her various visits how frequent the contacts the police have with the extreme poor are and the fact that only very few police officers

⁵⁰² See Narayan, Deepa with Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch-Schulte (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. pp. 31, 78 and 247.

⁵⁰³ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 100.

⁵⁰⁴ Ibid.

⁵⁰⁵ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November, 2006 p. 44 .

have been trained to deal with social problems or to understand the phenomenon of the social exclusion of the poorest people.⁵⁰⁶

It has been asserted in Nigeria that the police see themselves as existing for the government of the day⁵⁰⁷ and wealthy members of society, because the vast majority of persons arrested, tortured, charged, remanded in custody pending trial, prosecuted, and sentenced, especially to prison, are mostly the poor, the powerless and politically marginalized groups. In a recent publication, it was affirmed that the application of torture by law enforcement agents in Nigeria is ‘often class-determined, applied to people falling within particular divisions of a social caste system (the poor).’⁵⁰⁸ The rich and powerful members of society are often shielded from the full weight of the law and its enforcement.⁵⁰⁹ Also, in times of need the police serve, ‘those with power of resources able to claim the attention of the police more successfully than those without’.⁵¹⁰

In Nigeria, there seems to be no accountability in respect of human rights violations committed by the police, and making complaints to the authorities is like a second victimization. Complaints such as cases of death or serious injury in police custody or resulting from torture at the hand of investigating officers, wrongful or malicious arrest, extortion, etc., are often reported to the authorities, and sometimes taken up by non-governmental organizations and legal practitioners, but these are mostly left unaddressed and/or ignored, in the expectation that the complainants will eventually get tired. Complaints raised by ordinary individual members of the public are treated with utmost ignominy. Worse still, such complaints may simply get ‘lost in the system’.⁵¹¹

In the World Bank 2006 World Governance Indicators, covering the years 1996-2005 with the six measurements of political stability/no violence, government effectiveness, regulatory quality, voice/accountability, rule of law and control of corruption, Nigeria performed abysmally low scoring between 0 and 10 percent and 10th – 25th in four areas. It was only in two areas, regulatory quality and voice/accountability that Nigeria

⁵⁰⁶ See E/CN.4/2000/52 of 25 February 2000, the second report of the Independent Expert on human rights and extreme poverty, p. 15 para 53

⁵⁰⁷ See E.E.O Alemika and I.C. Chukwuma (eds) (2003), *Civilian Oversight and Accountability of Police in Nigeria*, Centre for Law Enforcement Education (CLEEN) Lagos, p. ix; see Chidi Anselm Odinkalu, “Changing Roles of Civil Society in Promoting Safety and Security in Nigeria,” in Etanbi E.O. Alemika & Innocent C. Chukwuma, (eds) (2004), *Crime and Policing in Nigeria: Challenges and Options*, CLEEN, Lagos p. 19.

⁵⁰⁸ See Leonard Dibia and Kayode Ogunbufunmi (2005), *Breaking Point*, Access to Justice, Lagos p. viii.

⁵⁰⁹ See E.E.O. Alemika, *Criminology, Criminal Justice and Philosophy of policing Nigeria Past, Present and Future*, Tamuno T. et al. (eds) (1993), Malthouse Press Limited, Lagos, p. 57, cited in Centre for Law Enforcement Education and the National Human Rights Commission (1999), *Policing a Democracy, A Survey Report on the Role and Functions of the Nigeria Police Force in a Post Military Era*, CLEEN, Lagos, p. 5.

⁵¹⁰ See Narayan, Deepa with Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch-Schulte (2000), *Voices of the Poor: Can Anyone Hear Us?* op. cit. p 186.

⁵¹¹ See E.E.O Alemika and I.C. Chukwuma (eds), op. cit. p. ix.

scored between 25 and 50 percent.⁵¹² The incidents of human rights abuses discussed in this work are themselves hallmarks of bad governance.

2.4 Efforts of government to deal with poverty

Past regimes (both military and civilian) to that of the immediate past of Olusegun Obasanjo, were not oblivious of the problem of poverty in Nigeria and have attempted to deal with this scourge. From 1976 – 2007 successive governments have designed various programmes targeted at poverty eradication or alleviation, and project vehicles were also fashioned to implement them.⁵¹³ Some of the strategies adopted included the economic growth strategy, basic needs approach, rural development strategy, etc. These programmes have over the years been executed through the various sectoral ministries and broad-based ministries such as the Federal Ministry of Finance and the National Planning Commission (NPC). Special agencies are sometimes created as vehicles for poverty alleviation programmes.⁵¹⁴

The immediate past civilian government of Olusegun Obasanjo first established the Poverty Alleviation Programme immediately on assumption of office in 1999 with the objective of creating 200,000 jobs for Nigerians.⁵¹⁵ The failure of the programme led to

⁵¹² See World Bank, WGI 2006: Worldwide Governance Indicators, <http://info.worldbank.org/governance/kkz2005/sc_chart.asp> accessed 5 June 2007.

⁵¹³ Some of these are, Operation Feed the Nation (OFN) which is targeted at mass food production and attacking hunger, Green Revolution, which is also targeted at making food available, Better life Programme, targeted at rural development and poverty alleviation of women, Community Bank Programmes, targeted at giving banking services and credit facilities access for the poor within their community, Directorate of Food, Roads and Infrastructure (DFRRI), focused on rehabilitation of rural infrastructure to boost productivity and incomes of the poor, Family Economic Advanced Programme (FEAP), focused on the stimulation of economic growth through investment, promotion and granting of credit facilities to low income groups, Family Support Programme (FSP), focused on activities similar to the Better Life Programme, Mass Mobilisation for Social and Economic Reconstruction (MAMSER), focused on encouraging the mobilization and participation of rural people in the development process, National Agricultural Land Development Authority (NALDA), focused on increased access and output of small holder farmers, raising agricultural productivity as well as the living standards in rural areas, National Economic Reconstruction Fund (NERFUND), focused on long-term concessionary loans to promote small industrial development, National Directorate of Employment (NDE), focused on vocational skills development and Small Scale Enterprises Development to combat unemployment, National Urban Mass Transport Programme (NUMTP), focused on erasing transportation congestion especially for workers, The Nomadic Education Programme (NEP), focused on education for nomads without endangering the sustainability of pastoralism, Oil and Mineral Producing Areas Development Commission (OMPADEC), focused on special aid for the development of the oil producing areas, People's Bank, with activities similar to those of the Community Banks, Petroleum (Special) Trust Fund (PTF), focused on rehabilitation of dilapidated infrastructure and abandoned projects, Primary Health Care (PHCS), focused on accessible health care at the lowest level, River Basin Development Authorities (RBDA), focused on raising agricultural productivity as well as the living standards in rural areas and the Strategic Grain Reserves Programme (SGRP), focused on stable grain prices & emergency assistance. See Ali Ensah, *Poverty in Nigeria: The Imperatives*, *Modus International Law and Business Quarterly*, vol. 4 No. 2 June 1999, p. 109.

⁵¹⁴ See note 385.

⁵¹⁵ See M.I. Obadan and A.F. Odusola, op. cit. p. 67.

the establishment of a new agency, the National Poverty Eradication Programme (NAPEP), which focused on skill acquisition and provision of working tools to the graduates of the scheme, while cash was given as unemployment benefit to some people.

The sum of N10 billion (approx \$80 million) was allocated for the programme (i.e. the NAPEP), but this was hijacked by party members and the bulk of the money was shared by party members and loyalists without the targeted poor people benefiting in any way from the programme. Only the children of politicians and their cronies benefited from the disbursement before the same was hijacked as the ruling party's 'national cake'. This was corroborated by the former Executive Secretary of the National Human Rights Commission (NHC), Alhaji Bukhair Bello who while in office faulted the implementation of the NAPEP, pointing out that political patronage remained its bane.⁵¹⁶

The government of Obasanjo after the incident modified the programme and also launched another one tagged, National Economic Empowerment and Development Strategy (NEEDS), which rests on four strategic pillars namely, reforming the way government and its institutions work, growing the private sector, implementing a social charter for the people and re-orientation of the people with an enduring African value.⁵¹⁷ The programme is also targeted at poverty reduction. This programme has been replicated at the State and local government levels.⁵¹⁸ The economic and political reforms encapsulated by this programme have been thought to be able to provide the missing link in all previous development plans, but its benefits are yet to trickle down to the poor masses and the situation of the poor remains substantially the same. It was therefore not surprising when the immediate past Speaker of Nigeria's lower legislative chambers - the House of Representatives - declared in his valedictory speech that the political leaders have failed Nigeria.⁵¹⁹

The government NEEDS was promoted and it received major support from the International Monetary Fund (IMF) in 2006 when the institution approved a two-year Policy Support Instrument for Nigeria, which will assist the Nigerian government to maintain prudent macroeconomic policies and strengthen its financial institutions and create conducive private-sector development.⁵²⁰

⁵¹⁶ See John-Abba Ogbodo, *Commission flays govt on human rights abuses*, The Guardian, 20 Dec, 2005. <<http://odili.net/news/source/2005/dec/20/11.html>> accessed 21 November 2005.

⁵¹⁷ See The Human Rights Law Services (2004), *Contextualizing NEEDS: Economic/Political Reform in Nigeria*, HURILAWS, Lagos, p. vii.

⁵¹⁸ There is State Economic Empowerment and Development Strategy (SEEDS) and Local Economic Empowerment and Development Strategy (LEEDS), at the State and local government levels respectively.

⁵¹⁹ See John-Abba Ogbodo, *Political leaders have failed Nigeria, says Masari*, The Guardian 1 June 2007 at <<http://www.guardiannewsngr.com/news/article19>> accessed 1 June 2007.

⁵²⁰ See The Organisation for Economic Co-operation and Development (OECD) 2007 Annual Report on Nigeria, p. 3.

<<http://www.oecd.org/dataoecd/27/18/38562978.pdf>> accessed 10 September 2007.

Poverty is also being combated in Nigeria through the MDGs, and the UNPD is collaborating with the Nigerian government to tackle the issue of poverty. For instance, the UNDP is assisting Nigeria to set up a Virtual Poverty Fund to track poverty reducing expenditure saved through the country's recent \$18 billion debt relief deal.⁵²¹

Some of the programmes may record a measure of success. The inconsistency of such programmes has made the gains of some of the programmes to be reversed. Lack of transparency, ineffective targeting of strategies and non-involvement of beneficiaries and stakeholders and severe budgetary constraints have made these programmes largely ineffective in tackling poverty.⁵²²

Confirming the above, the current Federal Government which came into power in May 2007 has referred to past Federal Governments' poverty intervention strategies as having recorded only "pockets of success" and that on the whole, these past efforts were a total failure and disappointing.⁵²³ Part of the reason for the current Federal Government to attest to the failure of such programmes was the dearth of planning data for articulation and interventions, non-participatory approach and lack of effective coordination at the three tiers of government, among others. This was said to be coupled with "the pervading corruption that has eaten deep into the fabrics of our national life." A combination of this was said to have resulted in the "half haphazard implementation of programmes in the past that have left more holes and dents, than they have sort to mend."⁵²⁴

The ineffectiveness of government programmes to tackle poverty in Nigeria has been corroborated by a recent assessment by the ILO on Nigeria. It stated that the government's NEEDS/SEEDS, might have ill-addressed the pangs of poverty assailing Nigerians, as poverty worsens in Nigeria.⁵²⁵ The result is the high incidence of poverty in Nigeria and poverty remains permissive and persistent.⁵²⁶

Also the Organisation for Economic Co-operation and Development (OECD) 2007 Annual Report on Nigeria not only confirms the high level of poverty in the country despite the government's efforts to improve the economy, but it also summarizes its

⁵²¹ See PostNuke, Poverty Reduction, at

<<http://www.ng.undp.org/index.php?name=News&file=article&sid=18> > accessed 10 June 2007.

⁵²² See M.I. Obadan and A.F. Odusola, "The Economy and Poverty in Nigeria", in D.A. Guobadia and Epiphany Azinge (eds) (2004) *Poverty, The Nigerian Economy and the Law*, NIALS Lagos p. 67.

⁵²³ The statements were credited to the Minister of National Planning and Deputy Chairman of National Planning Commission (NPC), Senator Mohammed Sanusi Daggash. See Umoru Henry, *Why previous poverty alleviation efforts failed- FG*, The Vanguard, 13 March 2008

<<http://odili.net/news/source/2008/mar/13/306.html>> accessed 13 March 2008.

⁵²⁴ Ibid.

⁵²⁵ See *Unemployment, poverty crises worsens despite NEPAD, NEEDS, says ILO*, The Guardian, 29 December 2006. <<http://odili.net/news/source/2006/dec/29/8.html>> accessed 29 December 2006.

⁵²⁶ Ibid. See also Animi Awah and Dele Peters, *Poverty Alleviation and the Control of Public Revenue: Legal and Equitable Issues*, paper presented at the Nigerian Association of Law Teachers Conference, held at Lagos State University (LASU), Ojo, Lagos, 23-26 April, 2002, p.11.

spiral effects when it states that ‘notwithstanding these positive developments,⁵²⁷ the Nigerian economy is still confronted with many serious challenges, notably the high level of poverty, inefficient delivery of social services, high youth unemployment, poor infrastructure facilities, and widespread insecurity and crime. All of these problems lower the quality of life and undermine the business environment’⁵²⁸

The current Federal Government in the month of February 2008 designed and launched another poverty reduction programme tagged “Community Economic Empowerment and Development Strategy” (CEEDS), which is to be a four-year plan targeted at addressing physical development as well as economic empowerment of the nation’s rural villages, communities and individual households. The programme is anchored on seven strategic areas of poverty reduction, social mobilization and partnership for development, community capacity enhancement, micro-finance, public works, ecological restoration and improvement, and productivity enhancement that is research driven. This is projected to lift 30 million Nigerians out of poverty by the end of 2011.⁵²⁹

Also, a special CEEDS implementation unit (CIU) is to be created in each of the Local Government Areas of the country and will liaise directly with the community project implementation committees and planning officers at the State and national levels for development of the plans. The three tiers of government are to use their relevant ministries/agencies to facilitate the process, by creating the enabling environment for effective collaboration of all stakeholders.⁵³⁰

The main problem with government projects designed to eradicate poverty may not be unconnected with the fact that in most cases the multidimensional nature of poverty is ignored, focusing on one item in a chain. Although the current poverty intervention

⁵²⁷ Referring to ‘Nigeria’s stock of foreign reserves that increased sharply from \$28 billion in 2005 to \$49 billion in 2006, despite the repayment of over \$12 billion to the Paris Club of creditors, and around \$1.4 billion to the London Club. The huge foreign reserves and the savings on debt servicing, along with related budget surpluses, relaxed the balance of payments and fiscal constraints on boosting investment in infrastructure and poverty reduction programmes. P.9 (OECD) The recent increases in world oil prices have enabled the government to pay off its remaining external debt, following the 60 percent debt relief (amounting to about \$18 billion) offered to Nigeria by the Paris Club of creditor nations. At the end of 2006, the Nigerian Parliament approved an expenditure of \$1.4 billion to liquidate the external debt owed to the London Club of non-sovereign creditors. The fiscal space created by the debt relief and high oil prices is expected to be used to finance investment in infrastructure and poverty reduction programmes.’ (OECD) See The Organisation for Economic Co-operation and Development (OECD) 2007 Annual Report on Nigeria, pp. 3, 4 and 9.

<<http://www.oecd.org/dataoecd/27/18/38562978.pdf>> accessed 10 September 2007.

⁵²⁸ See Organisation for Economic Co-operation and Development (OECD) 2007 Annual Report on Nigeria, p. 3 <<http://www.oecd.org/dataoecd/27/18/38562978.pdf>> accessed 10 September 2007.

⁵²⁹ This is credited to Senator Sanusi Daggash, the Minister of National Planning, at the launching of the programme, which is estimated to cost about N284.64 billion in four years. The programme is to be funded through the National Solidarity Fund, which is to be established and required to source funds from the private sector and faith-based organisations. See Oscarline Onwuemenyi, *CEEDS: Going to the root of poverty in Nigeria*, The Punch 17 February 2008 at <<http://odili.net/news/source/2008/feb/17/410.html>> accessed 19 February 2008.

⁵³⁰ Ibid.

programme of the government seeks to address a number of issues, it has not paid attention to the full implementation of all human rights, which norms encompass much wider elements of the current programme. It will be observed as noted above that one of the causes of failure of most international efforts at reducing poverty in the past was the lack of adequate human rights content.⁵³¹

2.5 Conclusion

In view of the above, it can rightly be said that corruption and lack of good governance in Nigeria are the most serious causes of mass poverty more than all the other factors put together. The failure of government efforts to effectively tackle poverty demands that the approach to solving the problem of poverty in Nigeria be changed, an avenue which is being explored in this work. It is however necessary to examine next, the rights implication of poverty.

3.0 RIGHTS IMPLICATIONS OF POVERTY

The deprivations suffered by people living in poverty, directly and indirectly impact on their human rights negatively and make them prone to rights violations more than those who are not in poverty. Poverty therefore virtually erodes all rights of the poor as a result of the interlocking nature of these rights. Some of the consequences of poverty on their human rights shall now be examined.

3.1 Right to life

Article 3 of the Universal Declaration of Human Rights (UDHR), provides that "everyone has the right to life, liberty and security of person". This right is equally protected by Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), and Article 9 provides for the right to liberty and security of the person.

This same right for the child is guaranteed by Article 6 of the Convention on the Rights of the Child (CRC), while Article 4 of the African Charter on Human and Peoples' Rights (African Charter) protects the right to life. The 1999 Constitution of Nigeria also insulates this right in section 33.

Right to life is a supreme right from which no derogation is permitted even in times of public emergency which threatens the life of the nation and existence of which is officially proclaimed.⁵³² Despite the importance attached to this right by international human rights and most domestic laws of states, this right is however largely unprotected, especially for the poor. In times of communal violence, religious riots, civil commotion, and security agents cracking down on defenceless and hapless civilians, and

⁵³¹ See Paschal Mihyo and Karin Arts, *op. cit.* p. 2; see Human Rights in Development <<http://www.unhchr.ch/development/poverty-01.html>> accessed 12 August 2007.

⁵³² See ICCPR Article 4.

other extrajudicial killings, which results in the summary deprivation of lives for several thousands of people, the poor are often the most affected casualty.⁵³³

Apart from the physical threat to life by acts of extrajudicial killings, the poor are also worst affected by deaths resulting from a chain of causal effects such as lack of adequate food and nutrition, lack of access to health, safe and potable water and adequate sanitation, housing and a healthy environment, etc.,⁵³⁴ as a result of this right's connection to such other rights.

The Committee on Economic, Social and Cultural rights (hereinafter called 'the Committee') attests that the right to health remains elusive, especially to those living in poverty.⁵³⁵ Lack of access to health therefore has resulted in premature death rates for both children and adults in Nigeria from avoidable and/or preventable diseases, which have been greatly associated with poverty.⁵³⁶

A recent report stated for instance that malaria kills 300,000 Nigerians yearly, with 821 people dying daily, while 34 malaria-related deaths are recorded every hour in Nigeria.⁵³⁷ Also related are deaths resulting in the poor in greater numbers from lack of access to safe drinking water, adequate sanitation and food, epidemics, dehydration, dysentery or bloody diarrhea and other water and malnutrition-related deaths.⁵³⁸ One of the fundamental problems in relation to access to food has equally been recognized as poverty.⁵³⁹

Lack of access to adequate housing for the poor also threatens their right to life by protection from harsh weather conditions (heat, wind, cold or damp) which combine to assail their health. These deficient housing and living conditions are invariably associated with higher mortality and morbidity rates.⁵⁴⁰ Lack of access to housing on the other hand results in homelessness and inadequate security for the poor. This makes the right to life of the poor threatened by acts of sleeping in unsecured or unsafe places making them prone to violence (sexual and physical) crime, murder, drugs, HIV/AIDS, kidnapping/disappearance and ritual killings⁵⁴¹ and these often lead to arbitrary deprivation of life.⁵⁴²

⁵³³ See General Comment 6 (right to life) para 2.

⁵³⁴ See General Comment 6 para 5; General Comment 14 – (right to health), para 4.

⁵³⁵ See General Comment 14 para 5.

⁵³⁶ See Diseases like malaria, tuberculosis and AIDS account for nearly 18 percent of the disease burden in the poorest countries. They are regarded as diseases of poverty because they are avoidable or treatable with existing medicines and interventions. See Philip Stevens, *Diseases of poverty and the 10/90 gap*, International Policy Networks, 2004 London, pp. 4 and 5.
<http://www.fightingdiseases.org/pdf/Diseases_of_Poverty_FINAL.pdf> accessed 10 April, 2008.

⁵³⁷ See Anietie Akpan, *Malaria kills 300,000 Nigerians yearly, says expert*, The Guardian 22 April 2008 <http://odili.net/news/source/2008/apr/22/34.html> accessed 22 April 2008.

⁵³⁸ See the World Health Organization (2003), *The Right to Water*, WHO, France p. 17; see General Comment 12 (Right to adequate food) para 5.

⁵³⁹ General Comment 12 para 5.

⁵⁴⁰ See General Comment 4 – (right to adequate housing) para 8 (d).

⁵⁴¹ See Mr. Leandro Despouy (E/CN.4/Sub.2/1996/13), op. cit. paras 158 and 160.

⁵⁴² General Comment 6 (right to life) para 4.

It is the result of the interconnectivity of the right to life with other human rights that the *ad hoc* working group on the draft of an international declaration on extreme poverty and human rights in its report setting out the proposed working paper contained in E/CN.4/Sub.2/2002/15 gave prominence to the right to life, with four other basic rights to adequate food, drinking water, shelter and health to be components of the right to life,⁵⁴³ and that a person, or group or persons who lacked them is considered to be living in extreme poverty. The configuration is based on the fact that life needs sustenance and the four components are required to sustain life.

The *ad hoc* working group emphasized the need for States to commence the immediate effective implementation of the ICESCR, by giving priority to provisions to the said four components. The group said that notwithstanding the provisions of Article 2 of the ICESCR which provides for progressive realization of social economic rights, a logical conclusion is that the right to life cannot be progressively realized and that failure to implement such measures would entail the death of thousands of persons.⁵⁴⁴ The analysis of poverty and people living in poverty indicated the interlocking element of sustenance, going without food, eating little food, poor health, illness and loss of life; this is why the right to life has been said to be often too narrowly construed.⁵⁴⁵

On the other hand, the right to life may be worthless or useless to a poor person, despite the fact that he is not subject to any physical violence that threatens life. There are reports of people committing or attempting to commit suicide because of the total absence of the means to sustain their lives. Therefore, what does the right to life mean to a man when indeed feels he will be happier if he lost that very life?⁵⁴⁶ This reinforces the submission of the *ad hoc* working group for the immediate implementation of ESC rights.

3.2 Right to fair hearing

Article 10 of the UDHR provides for fair trial, while Article 14 of the ICCPR provides for this. Article 7 of the African Charter protects the same right, while Section 36 of the 1999 Constitution guarantees the same. Some of the elements of this right under the UDHR are equality before the courts and tribunals, the right to be tried without undue delay and the right to have legal assistance assigned to someone if he cannot afford the cost.

Section 36 of the 1999 Constitution provides the effect that in the determination of a person's civil rights and obligations, including any question by or against any government or authority, he shall be given fair hearing within a reasonable time by a court or tribunal, in such a manner so as to secure its independence and impartiality. It also provides among others, the presumption of innocence for any person charged with a

⁵⁴³ See Para 17 of E/CN.4/Sub.2/2002/15.

⁵⁴⁴ Ibid at para 22.

⁵⁴⁵ See The Human Rights Committee in General Comment 6 (right to life).

⁵⁴⁶ See Hon. Dr. T. Akinola Aguda (1987), *op. cit.* p. 8.

criminal offence until proven guilty, right to be informed promptly in the language that he understands and in detail of the nature of the offence, be given adequate time and facilities for the preparation of his defence, be entitled to defend himself in person or by a legal practitioner of his own choice.⁵⁴⁷ The right without payment, to an interpreter, if he cannot understand the language used at the trial, right to a record of the proceedings and to obtain copies of the judgment in the case within seven days are also preserved.

The experience of the poor in Nigeria standing trial for criminal offences and being incarcerated for about ten years violates these provisions. Most of the accused persons including those standing trial for offences carrying capital punishment have no legal representation,⁵⁴⁸ and the poor also cannot afford legal representation and the cost of funding long litigation in civil matters.⁵⁴⁹ In research conducted on the Perceptions of the Quality of Justice rendered by the Civil Justice System in Nigeria, the result of the research with respect to the fairness of the system in treating litigants, 81.2 percent of litigants covered in the research expressed the view that the rich get quality of justice rendered in the civil justice system while 42.4 percent said the poor get quality justice. Among lawyers 85.0 percent of them indicated that rich litigants get quality justice while only 45.0 percent of lawyers believed that the poor get quality justice.⁵⁵⁰ It was generally agreed by litigants, lawyers, judges and court administrators that rich litigants are fairly treated.⁵⁵¹

The report also indicated that data collected during the research indicated that the average period within which matters are disposed of (i.e. from filing to delivery of judgment) are: land matters – 7.8 years; personal injuries/tort cases - 3.4 years; commercial – 3.3 years and family disputes/divorce matters 2.5years.⁵⁵² It is important to state that these are only in the trial courts alone, (i.e. the High Court). It did not take into account the likelihood of appeals on those judgments to the Court of Appeal and if litigants are still not satisfied they can further appeal to the Supreme Court.

A 2006 judicial assessment of the integrity and capacity of the justice system in three Nigerian States carried out by the United Office on Drugs and Crime (UNDOC) put the national sample average in timeliness of the courts at 4.96 (measured on a scale of 0 -

⁵⁴⁷ In *Awolowo v. Minister of Internal Affairs*, [1962] L.L.R. 177, it was held that the right to a legal practitioner of one's own choice protected by the Constitution implies the instruction of a legal practitioner who is not under a disability of any kind.

⁵⁴⁸ See the Report of the National Working Group on the Reform of Criminal Justice Administration Office of The Honourable Attorney-General of the Federation) dated 14th June, 2005 Revised 12th August, 2005.

⁵⁴⁹ See I.A. Ayua, and D.A. Guobadia (eds) (2001), *Technical Report on the Nigerian Court Procedures Project, including Proposal for Reform of the High Court of Lagos State Civil Procedure Rules*, Nigerian Institute of Advanced Legal Studies, p. 43; see CEDAW/C/NGA/6 of 5 October 2006 Sixth periodic report of State Parties - Nigeria, to be examined at CEDAW's 41st Session 30 June – 18 July 2008 p. 100.

⁵⁵⁰ See I.A. Ayua and D.A. Guobadia (eds.) (2001), op. cit. p. 21 Table 1.

⁵⁵¹ Ibid.

⁵⁵² Ibid p. 23.

10).⁵⁵³ On the criminal justice system, the 2005 report of the National Working Group on Prison Reforms and Decongestion indicated that most prison inmates in Nigeria have spent between 2 – 15 years in prison awaiting trial, almost 80 percent of convicts who have appeals have no legal representation and 75 percent of inmates awaiting trial have no legal representation.⁵⁵⁴

3.3 Right to personal liberty

The same Article 3 of the UDHR that provides that the right to life also covers the right to liberty. The UDHR further provides in Article 9 against arbitrary arrest and detention. This right is equally guaranteed under Article 9 of the ICCPR, the African Charter in Article 6 provides for the right to liberty and the security of one's person. The same right is protected by the 1999 Constitution in section 35. As already examined above, the poor are prone to incessant arrests and long periods of detention without trial. This is in spite of the fact that section 35 of 1999 Constitution provides that no person shall be detained for more than 24 hours where there is a court of competent jurisdiction within a radius of 40 kilometres and in any other cases 48 hours or as the court might deem to be reasonable without being arraigned in court; if a person is not tried within two months from the date of arraignment he must be released unconditionally or on bail on reasonable conditions.

Voices of the Poor documents the views of the poor in this way: 'These very poor groups also are said to have no freedom.'⁵⁵⁵ As seen above, we have examined situations of poor suspects being subjected to extortion of money in the form of bribes, either from the suspects or from their relatives, by the police before they are given bail, and how they find it difficult to raise such money despite the usual claim that bail is free by the police in Nigeria.

The situation with the poor standing criminal trial in court is even worse in terms of exercising the right to liberty by way of court bail.⁵⁵⁶ The pathetic situation of the poor in this regard has been lucidly painted in a publication where the authors stated thus: 'What has poverty got to do with Bail? Everything! In Nigeria, access to bail implies the ability to pay for the services of a lawyer, to hire a surety, and invariably to "grease the palms" of court registrar and security personnel having custody of the suspect. If what is needed to ease his bail is not available to a suspect, then he is sent back to prison to

⁵⁵³ See United Nations Office on Drugs and Crime, Assessment of the Integrity and Capacity of the Justice System in three Nigerian States: Technical Assessment Report, 2006, United Nations, New York, p. 21.

⁵⁵⁴ See Federal Government of Nigeria, Report of the National Working Group on Prison Reforms and Decongestion, Abuja, 2005, p. 6.

⁵⁵⁵ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 89.

⁵⁵⁶ The issue of bail is also provided in sections 17, 18, 30 and 31, 118-143 of the Criminal Procedure Act Cap. 80 Laws of Federation, 1990 which apply in the Southern Nigeria and sections 45, 340(1) of the Criminal Procedure Code Cap. 30 Laws of Federation 1963, which applies to Northern Nigeria, which makes it mandatory for bail to be granted by both the courts and police, for offences if the suspect is not likely to jump bail and where the offence is neither a serious offence nor one punishable by death.

await the day when he can afford it. To these classes of people, law is seen as an instrument of injustice. In practice, 'it is the powerful, the rich and the dominant class that seem to have all the rights, while the only right left to the poor, the weak and the downtrodden seems to be their right to suffer in silence...' ⁵⁵⁷

The hapless poor in Nigeria are arrested for spurious reasons and for offences not known in law 'such as wandering' ⁵⁵⁸ and 'illegal sitting' because the police know they are poor, powerless, ignorant and illiterate. For example a poor man was reported to be relaxing on the balcony of his house with a towel tied around his waist, when the police on patrol reportedly picked him for 'illegal sitting' in front of his house! Despite protesting and claiming that he had not offended the law he was taken to the police station and detained, and what was written on the charge board at the police station against his name was 'illegal sitting'. ⁵⁵⁹ That can only happen to the poor.

In Nigeria, people, especially the poor are arrested at random and kept in detention for over ten years without trial, ⁵⁶⁰ while the influential people or their relations, if they even get arrested, are promptly released by mere phone calls, except where they are arrested on the orders of the government for security or political reasons. A former Justice of the Supreme Court of Nigeria, Hon. Justice Oputa, has described the detention of persons except as provided for in the Constitution as the most violent affront on both human dignity and human rights. The eminent Jurist added that 'detention of people is a necessary evil in developing countries, but what makes the evil more monstrous is if the person detained has no access to any form of justice.' ⁵⁶¹

For example, in *Shola Abu and 349 Ors v. Commissioner of Police, Lagos State and Ors*, ⁵⁶² the applicants were 350 people who had been detained for periods ranging from 3 to 10 years without trial, on the orders of various Magistrates' Courts in Lagos State on holding charges relating to different offences. Holding charges have been declared

⁵⁵⁷ See Akin Ibidapo-Obe and Clement Nwankwo (1992), *The Bail Process & Human Rights In Nigeria*, Constitutional Rights Project, Lagos p. 55.

⁵⁵⁸ See *Adegbola v. Inspector General of Police* [2002] 1 NPILR 285 the plaintiff sued the police for his illegal arrest and detention for the offence of wandering, an offence which has long been removed from the statute books. The court held that the plaintiff's right to freedom of movement was violated.

⁵⁵⁹ See Christy Anyanwu, *New face of policing in Lagos*, Daily Sun, 11 August 2007
<<http://www.sunnewsonline.com/webpages/features/living/2007/aug/11/living-11-08-2007-001.htm>>
accessed 11 August 2007.

⁵⁶⁰ See Kelechi Okoronkwo and Nkechi Onyedika, *Initiatives against illegal detention*, Daily News, 18 September 2007

<<http://www.sunnewsonline.com/webpages/opinion/editorial/2007/sept/18/editorial-18-09-2007-001.htm>> accessed 18 September 2007 where it was reported that Chief Michael Aondoakaa, the Minister of Justice and Attorney-General of the Federation, was reported to have said that his ministry had set up the Directorate of Citizens Rights to treat cases of violation of people's rights and urged the public to report cases of illegal detention to his office for prompt action.

⁵⁶¹ See Hon. Justice Chukwudifu Akunne Oputa (1989), *Human Rights in the Political and Legal Culture of Nigeria*, Nigerian Law Publications Ltd. Lagos, p. 88.

⁵⁶² [2006] CHR 1.

unconstitutional by many judicial decisions.⁵⁶³ A ‘holding charge’ simply put, is a practice whereby the police rush to court on what they generally refer to as ‘a holding charge’, even before they conduct an investigation and arraign a suspect before a Magistrate Court for an offence which the court does not have jurisdiction to try. What the Magistrate Court does is make an order for the remand of the accused in prison custody, pending the filing of information and arraignment of the accused before the High Court, instead of making an order striking out the matter.

The police usually inform the court that the matter is still being further investigated and where the police do not succeed in assembling relevant evidence to prosecute the accused, the police throw in the towel and the accused is left to rot away in jail for years. The full evil effect of this obnoxious practice came to light in the 2005 Report of the National Working Group on Prison Reforms and Decongestions, which indicated that a whole 40 percent of the inmates awaiting trial in Nigerian prisons were held on holding charges.⁵⁶⁴

The above report has however recommended among others that prison inmates with the option of a fine from N10,000 (approx. \$80) and below should be considered for immediate release, while for those who could not post their bail due to onerous bail conditions, conditions may be relaxed to enable them to post bail and get out of prisons to continue with their trials. It also recommended that those ordered to be remanded as civil lunatics should be immediately removed from prison and handed over to appropriate institutions, while their relations who facilitate their incarceration should be reprimanded and be made to bear the cost of their treatment.

The said 2005 report also indicated that ten percent (10.5%) of the convicted prison inmates in Nigeria were in prison for minor offences carrying sentences of six months and less or the option of a fine. However, the judicial officers in such cases did not consider and award non-custodial sentences for those minor offences. There are those convicts that could not afford to pay fines as little as \$40 or even below. During the fieldwork, a Director at a State Office of the Public Defender stated during discussions that in some cases, they have to pay for fines on behalf of convicted poor people who cannot afford to pay their fines and who on the account of this have remained behind bars for a long period.

The Director added that in fact when such persons are finally released, they usually have no money to go home and family may not be able to afford the transportation cost to come and meet them or that family members may be unwilling to associate with a

⁵⁶³ *Johnson v. Lufadeju*, (2002 N.W.L.R. (Pt.768) p.192; *Ogor v. Kolawole*, [1985] 6 N.C.L.R. 534
Enwerem v. C.O.P., [1993] 6 N.W.L.R., (Pt.299) p. 333; *Onagoruwa v. The State*, [1993] 7 N.W.L.R.
(Pt.303) p. 49.

⁵⁶⁴ In *Jonathan Faramade & 9 Ors v. Controller of Prisons, Lagos State & 2 Ors.*, [Unreported Suit No. M/505/97]; *Tobi Dahunsi & 12 Ors. V. Controller of Prisons, Lagos State, & 2 Ors.*, [Unreported Suit No. M/607/97]; *Rasaki Ishola & 12 Ors. V. A-G. Lagos State & 2 Ors* [Unreported Suit No. M/37/98], the applicants in the three cases were remanded in prison custody on account of holding charges for periods ranging from two to over ten years respectively, before human rights NGOs came to their aid and secured their release.

convict because of involvement in crime, and that in such cases, they also have to arrange for money to enable them to reunite with their family members.

However, the Administration of Criminal Justice Bill⁵⁶⁵ is presently before the National Assembly for passage into law, which seeks to reform the criminal justice system in Nigeria and among others to regulate the police powers to detain suspects.⁵⁶⁶ The Bill also provides clearer guidelines for police and judicial consideration for bail, record keeping by the relevant law enforcement agencies, data collection, monitoring and control, bail – depositing money for bail as opposed to recognizance and compulsory legal aid for indigent people, plea bargaining for minor offences which do not involve the use of violence (offences punishable with imprisonment more than three years will not be subject to plea-bargaining), alternatives to imprisonment, such as community service, suspended sentences and parole, and payment of compensation to the victims of crime.

It is hoped that the Administration of Criminal Justice Bill when finally passed into law will standardize the arrest of criminals, achieve a centralized criminal record registry for the country and equally ensure speedy trial. The use of policemen as prosecutors was however not considered by the reform and this was deemed necessary by some of the people interviewed during the fieldwork, including officials of the Department of Public Prosecutions (DPP), who stated that the police contribute to the delay in criminal trials, as they are not well trained for the job (non-lawyers). This they claimed results in ineffective prosecutions and long incarcerations of suspects in jail.

⁵⁶⁵ See Office of The Honourable Attorney-General of the Federation, the Report of the National Working Group on the Reform of Criminal Justice Administration, dated 14th June, 2005 Revised 12th August, 2005.

⁵⁶⁶ Under Part I of the Bill, for police to remand suspects, it is demanded in the new Bill that reasons be given for any request for remand order. Also, the new Bill has abolished the ‘holding charge’ and provided that anybody that is accused should be charged before the proper court and that if the police are not ready to charge the person before the proper court, then they can file an application before the court by way of a motion seeking for an order that the person be remanded pending the time the person would be charged before a proper court. The application has to show the reasons why the person needs to be remanded and the period of time requested for the remand. The court before which the application is brought may grant the request for remand not exceeding 30 days and shall fix the return date of the case at the end of that period. If on the return date, the person has not been charged before the court, the person may be released on bail. However, the police can bring an application for extension of that remand period for a time not exceeding another 30 days. If at the end of that 30 days he has not been charged before the court, the police can request another further and final 30 days at the end of which the person must be released. Under the Bill, no one can be detained in remand custody for a period exceeding 90 days. I Article 22. (It is the submission of this work that, given the antecedents of the police in Nigeria, the Bill should have simply provided that nobody shall be detained in custody for more than 48 hours without an order of a court of law. This is what is provided in Article 22(2) of the Constitution the Russian Federation, 1993. The law can then further stipulate that the court shall fix the duration of the detention order.

Despite this Bill, this work still believes that getting access to justice is very important in protecting or enforcing the rights of the poor, in addition to other measures.⁵⁶⁷

3.4 Right to dignity of the human person and freedom from torture

Under this heading, two rights will be considered because of their link: first the right to dignity and second, the right to freedom from torture.

3.4.1 Right to dignity

The UDHR provides for equal dignity and rights in Article 1, and the 1999 Constitution provides in section 34 for the right of 'every individual to respect for the dignity of his person.'⁵⁶⁸ This right is protected by Article 5 of the African Charter, and Section 33 of the 1999 Constitution forbids torture, or inhuman or degrading treatment.⁵⁶⁹

From our discussion of the way that the poor are treated shabbily, both by law enforcement agents and civil servants, such practice violates their right to dignity. The example given earlier of a woman and her children who were turned away from a public park as a result of the condition of their appearance is relevant here. Also, the poor as noted above complained of living 'a wretched life' (both in terms of accommodation and inability to afford decent clothes for themselves and their family members), being insulted, forced to accept rudeness or humiliation, insults and indifference when they seek help, being in perpetual debt, joblessness, having to beg for alms, being made to depend on others for existence, and so on, have greatly diminished this right and erode the dignity of poor people. It will be noted that one of the poor remarked above, that nobody cares about them, attests to the loss of dignity by the poor. Governments as the primary duty bearers of rights have the obligation to promote, respect and fulfil the human rights of all people within their jurisdictions, especially the poor, because of their vulnerability.⁵⁷⁰

⁵⁶⁷ This work also recommends that the police authorities should greatly de-emphasize arrest and that arrest should be made the last resort when it is really necessary. The current practice of making arrest the first stage of investigation is condemnable.

⁵⁶⁸ According to the decision of the Supreme Court in *Ogugu v. the State* (1994) 9 NWLR (Pt. 366), p. 1, convicted prisoners are not deprived of this right on account of their conviction.

⁵⁶⁹ The UN Special Rapporteur on Torture – Manfred Nowak, in his visit to Nigeria in March, 2007, confirmed the position and said, "Torture and ill-treatment is widespread in police custody ... torture is an intrinsic part of how law enforcement services operate within the country," "Other methods include suspension from the ceiling or on metal rods, and the denial of food, water and medical treatment." His report described the conditions of detention in the police cells visited as "appalling," and as demonstrating a "total disrespect for human life and dignity." See Naijanet.com, *Police torture 'widespread' in Nigeria: UN report*, 9 March, 2007

<<http://naijanet.com/news/source/2007/mar/9/1005.html>> accessed 20 March 2007.

⁵⁷⁰ The concept of rights creates obligations deriving from the international human rights law by reference to the duties to respect, protect and fulfil. The duty to respect requires the duty bearer not to breach directly or indirectly the enjoyment of any human right. The duty to protect requires the duty bearer to take measures that prevent third parties from abusing the right. The duty to fulfil requires the duty bearer to adopt appropriate legislative, administrative and other measures towards the full realization of human rights. This obligation can be traced to the United Nations Charter, Universal Declaration of

The effect of poverty on the dignity of the human person can be summed up as given by a poor woman:⁵⁷¹

Poverty is pain; it feels like a disease.

It attacks a person not only materially but also morally.

It eats away one's dignity and drives one into total despair. — a poor woman in Moldova 1997

The poor are also held in contempt by the society and even by their family members. It was thus not surprising that it was acknowledged internationally that poverty constitutes a denial of human dignity.⁵⁷²

3.4.2 Freedom from torture

The UDHR in Article 5 prohibits torture; the ICCPR forbids this in Article 7 and also in Article 10(1) provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of human persons. Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) equally provides that no exceptional circumstances whatsoever may be invoked as a justification for torture, not even war or in cases of emergency. The provision of CAT in particular indicates the seriousness of protecting this right. The 1999 Constitution in section 33 prohibits torture, or degrading or inhuman treatment.

The various forms of police torture employed during investigation⁵⁷³ are naked violation of this right because such illegal practice claims more poor people as victims. There are

Human Rights, and binding norms and values set out in the international law of human rights. See OHCHR, Human Rights and Poverty Reduction: A Conceptual Framework, United Nations, New York and Geneva, 2004 pp. 14-15.

⁵⁷¹ See Narayan, Deepa, et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 6.

⁵⁷² See The Vienna Declaration and Programme of Action, Article I-25 (A/CONF.157/23), the United Nations Millennium Declaration (General Assembly resolution 55/2), para. 11; and General Assembly resolutions, such as resolutions 47/196 and 61/157 cited in A/63/274 of 13 August 2008, Interim report of Ms. Magdalena Sepúlveda Carmona, Independent Expert on the question of human rights and extreme poverty, p. 7 note 10.

⁵⁷³ Law enforcement agencies in Nigeria, especially the police are the most culpable for violations of this right; they use torture and other cruel, inhuman and degrading treatment to brutalize and dehumanize mostly poor people during arrest and detention. Such cruel and inhuman treatment includes, severe beating or flogging and other forms of beating (with horsewhips and electric cables, metal or wooden objects, e.g. planks of wood, iron bars) - which normally precedes police interrogation, deprivation of suspects of any clothing, including underpants, insertion of needles/pins or broomstick hair (bristle) into the penis of suspects, tying the legs and hands of suspects and then hanging them with the aid of rope to ceiling fan hooks, or hanging of suspects upside down (termed the 'crucifixion' method, which sometimes leads to suspects bleeding through the nose), insertion of objects into the private parts of the suspect (if female), use of electric shocks on suspects, use of cigarette lighters and teargas on suspects, removal of fingernails or cuticles with pliers, mock executions, etc. In fact the police have specially designed gadgets and devices used for torture. The infliction of violence and pain on suspects in most cases start from the time of arrest. See Leonard Dibia and Kayode Ogunbunmi (2005), op. cit. pp. 5-30; Access to Justice, Paths to Justice, Access to Justice Newsletter vol. March 2005, pp. 3-5.

people who are permanently disabled, die from injury inflicted, blinded or who suffer one serious injury or the other from police torture practices.⁵⁷⁴

The evil of torture and cover up of perpetrators that goes with it has been encapsulated in the words of the former Secretary-General of the UN, Dr. Kofi Annan, when he stated thus,⁵⁷⁵ *'Torture is not only one of the vilest acts that one human being can inflict on another, it is also among the most insidious of all human rights violations. All too often, it is veiled in secrecy except from those who, cowering in nearby cells, might be its next victims. Victims are often too ashamed or traumatized to speak out, or face further peril if they do; often they die from their wounds. Perpetrators, meanwhile, are shielded by conspiracies of silence and by the legal and political machinery of states that resort to torture'*

Torture is both degrading and inhuman. In respect of torture by the police or other law enforcement agents in Nigeria, this work recommends that torture be criminalized in Nigeria, based on being violative of human rights. Article 2(1) of CAT provides that the State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture under its jurisdiction. Importantly, Article 4(1) provides that each State Party shall ensure that all acts of torture are offences under its criminal law. It provides in addition that the same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Article 4(2) further provides that State Parties shall make the offences punishable by appropriate penalties which take into account their grave nature.

Torture also violates the right to health as it inhibits the right of the victim to control his/her own health and body.⁵⁷⁶

Although torture is prohibited by the Constitution, the problem of access to justice has constituted a big hindrance to the realization of this right. Criminalizing torture will further reinforce this right, coupled with a solution for access to justice as being canvassed in this work.

There is yet another form of torture for the poor. The poor have been reported to be constantly going through torture both physically and psychologically.⁵⁷⁷ One of the psychological effects of torture inflicted by poverty has been described as that of an 'able bodied man or woman to wake up in the morning and not have the smallest clue as

⁵⁷⁴ See Leonard Dibia and Kayode Ogunbufunmi (2005), op. cit. p. 7; the Human Rights Violations Investigations Commission Report, Synoptic Overview, May, 2002. pp. 52-53. <<http://www.dawodu.com/oputa1.pdf>> accessed 1 June 2007; Constitutional Rights Project (2002), *Confronting Abuses of the Past: Issues at the Oputa Commission*, CRP, Lagos p. 35; Civil Liberties Organisation (2005), *Climate of Impunity*, A Report on the Use of Torture by the Nigeria Police, CLO, Lagos, p. 32; Olisa Agbakoba, SAN and Stanley Ibe (2004), *Travesty of Justice, An Advocacy Manual Against the Holding Charge*, The Human Rights Law Service, Lagos pp. 5-51.

⁵⁷⁵ See Statement made by the United Nations Secretary-General, Dr. Kofi Annan, on the International Day in Support of the Victims of Torture, June 26, 2000, cited in Civil Liberties Organisation (2005), op. cit. p. 2.

⁵⁷⁶ See General Comment 14 (E/C.12/2000/4 of 11 August 2000) para 8.

⁵⁷⁷ See Mr. Leandro Despouy, Special Rapporteur final report, (E/CN.4/Sub.2/1996/13) op. cit. para 159.

to how or where he is going to find a meal to eat the whole of that day, not to talk of the day after.⁵⁷⁸ It has also been regarded as most inhuman and ‘degrading for an able-bodied man or woman willing and able to work, to find him or herself a victim of unabated and frustratingly prolonged unemployment.’⁵⁷⁹ Such a situation it has been said leads progressively from optimism to pessimism and from pessimism to fatalism accompanied by a dreadful feeling of insecurity, of complete economic helplessness and failure.⁵⁸⁰

During the fieldwork, some of the people interviewed stated that lack of money or access to money or loans creates torture especially for a person who has a family to cater for. Some of the people interviewed stated that lack of money breeds great fear in people, while some others said to live without money or means to sustain life can be likened to ‘someone dead but not yet buried.’ Some of those interviewed stated that the living conditions of the majority of Nigerians are degrading and dehumanizing, and lack of access to the means of livelihood constitutes a daily nagging torture for the poor.

It has been revealed in a recent report in Nigeria that torture occasioned by poverty can be a causative factor for mental illness. According to a report in 2005, an alarming increase in the number of patients with mental disorders was reported as being recorded daily at the nations’ psychiatric hospitals. According to the report, it was said that investigations by correspondents revealed that on average, four new cases are reported at the Psychiatric Hospital in Yaba, Lagos, Nigeria alone, on a daily basis. It was added that the 500 bed spaces at the hospital are fully occupied while there are many out-patients who come to the hospital daily for treatment.

The Chief Medical Director of the Hospital was reported to have attributed the trend to a ‘mental disorder situation, which is mainly caused by social deprivation and lack of ability to cope with poverty and sustenance.’⁵⁸¹

3.5 Right to participate

Article 21 of the UDHR provides for the right of everyone ‘to take part in the government of his country, directly or through freely chosen representatives’. The ICCPR in Article 25 specifically provides for ‘the right and opportunity of every citizen, without distinction (i.e. discrimination as specified in Article 2) and without unreasonable restrictions, to take part in conduct of public affairs directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, to have access on general terms of equality to public services in his country’.

⁵⁷⁸ See T. Akinola Aguda (1986), *The Crisis of Justice*, Eresu Hills Pub. p. 54.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid.

⁵⁸¹ X, People with mental illness on the increase- Psychiatrist, *The Punch*, 4 July 2005 p. 10.

Article 8(2) of the Declaration on the Right to Development, also provides that ‘States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.’⁵⁸²

Article 13 of the African Charter provides for the right of every citizen to participate freely in the government of his country and the right of equal access to public services. The 1999 Constitution has no provisions on the right to participate or on equality of access to public services of the government. In the account of the *Voice of the Poor*, poor people were said to have expressed the desire to have influence and control over institutions that affect their lives, but the reality documented was that of exclusion and alienation.⁵⁸³

The humiliation of the poor when seeking access to public services rendered by the government, extortion of money, and the lack of transparency in government policies, and cumbersome rules and regulations of government which cannot be understood by the poor on account of illiteracy exclude the poor in violation of this right. It has been noted for example that extreme poverty cannot be eradicated or reduced if the experience of those living in extreme poverty continues to be ignored.⁵⁸⁴

Access to information on the conduct of government and on their rights will empower the poor. It is generally believed that there is public interest in giving people a right of access to information held by the public authorities and in increasing the transparency of governmental decision-making.⁵⁸⁵ Exclusion and the conduct of affairs of the government in secrecy⁵⁸⁶ breeds corruption and access to information will enable the poor to demand accountability from all actors.⁵⁸⁷ Recently, an Access to Information Bill was passed in Nigeria⁵⁸⁸ and if eventually signed into law, it is hoped that the poor will benefit most from this law as it will grant them enforceable rights, which they can use to access government information and public documents/legislation. The only challenge the poor may face in this regard is that of access to justice, the solution for which is articulated in this work.

3.6 Right to freedom from discrimination

⁵⁸² See UNDP, Human Development Report 2000, op. cit. p. 95.

⁵⁸³ See Narayan, Deepa, et al. (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 182.

⁵⁸⁴ See A/63/274 of 13 August 2008 Interim report of Ms. Magdalena Sepúlveda Carmona, Independent Expert on the question of human rights and extreme poverty, p. 11 para 42.

⁵⁸⁵ See Philip Coppel (2004), *Information Rights*, Sweet and Maxwell, London p. v.

⁵⁸⁶ Historically, in the United Kingdom too, it has been shown that the central government has been slow to shed the aura of secrecy surrounding its processes, as legislation conferring rights of access to information has been piecemeal, sometimes prompted by the requirements of European Union Law.

See Philip Coppel (2004), op. cit. p. v.

⁵⁸⁷ See UNDP Report 2000, op. cit. p. 106.

⁵⁸⁸ Which the former President has not assented to as at April, 2007; see The Editorial, *The President and Freedom of Information Bill*, The Guardian, 20 April, 2007

<<http://odili.net/news/source/2007/apr/20/39.html>> accessed 20 April 2007.

The UDHR in Article 2 provides non-discrimination in respect of all rights and freedoms. The ICCPR also in Article 2 provides for non-discrimination by States of any kind, whether on grounds of property, birth or other status among others. The right to be treated without discrimination is provided in Article 28 of the African Charter, and in Article 3 provides that ‘Every individual shall be equal before the law’, and that ‘Every individual shall be entitled to equal protection of the law’, while in Article 28 it further provides for the duty of every individual to respect and consider his fellow human beings without discrimination. The right to freedom from discrimination is enshrined in Section 42 of the 1999 Constitution which provides against any form of discrimination on the grounds of place of origin, tribe, sex, religion or political affiliations or by reason of the circumstances of his birth.

The way the poor are marginalized on account of poverty, humiliated when seeking access to government services, and being denied access to information and participation are equally discriminatory of the poor. We noted above, situations where the rich and people of influence command the attention of the police. The incessant arrest and harassment of the poor as revealed by the poor in Nigeria in their discussion published in the *Voice of the Poor*, violate this right.

Discriminatory practices against the poor have been described as a major problem that keeps them from breaking the cycle of poverty. At an inter-agency and multi-stakeholder event to mark the end of the First UN Decade for the Eradication of Poverty by the International Forum on the Eradication of Poverty, it was observed that ‘stigmatization and discrimination is another important aspect addressed in the guidelines for eradicating poverty.’ It was further stated that ‘the poor are often discriminated against not only on the grounds of poverty but also race and gender as well’ and in this way the forum urged that it is crucial to see these discriminations as complex. In addition the poor are said to be ‘routinely stigmatized because of the places in which they live.’⁵⁸⁹

Discrimination has been said to breed insecurity and fear in the poor, a situation which prevents them from accessing government services.⁵⁹⁰ Related to this as noted above, is the fact that discrimination makes the poor avoid government institutions and to regard them as irrelevant in their lives.

Discrimination may take many forms, such as the unequal enforcement of laws, even if the laws are fair. In the *Voices of the Poor* for instance, it was revealed “the extent to which the police and official justice systems side with the rich, persecute poor people and make poor people more insecure, fearful and poorer”⁵⁹¹ ‘The selective application of laws translates into gender, racial and ethnic discrimination (forms of horizontal

⁵⁸⁹ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November 2006 p. 62.

⁵⁹⁰ See DFID, *Safety, Security and Accessible Justice*, July, 2002 p. 13.

⁵⁹¹ See Narayan et al., *Voices of the Poor*, op cit p. 163 cited in United Nations Department for Economic and Social Information and Policy Analysis: *The Inequality Predicament - Report on the World Social Situation*, 2005 pp. 17-18.

inequality) directed against the poorer segments of society.⁵⁹² ‘In other cases, the laws themselves may be inequitable, land-grabbing, which displaces or uproots poor people is typically the result of discrimination against this vulnerable group, and this can take the form of legalized expropriation.’⁵⁹³

3.7 Right to freedom of movement

The UDHR provides for freedom of movement in Article 13, while the African Charter in Article 12 provides for the right to freedom of movement. The 1999 Constitution in section 41 provides for the right of every citizen of Nigeria to move freely throughout Nigeria and to reside in any part therein.

‘Nigeria has 194,394km (120,791 miles) of roads and most Nigerians travel by bus or taxi both between and within cities. During the 1970s and 1980s federal and state governments built and upgraded numerous expressways and trans regional trunk roads. State governments also upgraded smaller roads, which helped open rural areas to development. However, by the mid-1990s lack of investment had left most of the roads to deteriorate.’⁵⁹⁴ ‘Nigeria has 3,505km (2,178 miles) of operated railway track. The main line, completed in 1911, links Lagos to Kano, with extensions from Kano’ to about five other cities/towns. ‘The use of railways, both for passenger and freight traffic, has declined due to competition from the road network.’⁵⁹⁵

As with the situation under the right to liberty, the police have served as a block wall for the realization of this right through the mounting of numerous illegal checkpoints on the roads, subjecting pedestrians and commuters to a series of harassments and extortion, under the guise of ‘stop and search’.⁵⁹⁶ Policing has been largely oppressive in Nigeria, especially on the hapless poor.⁵⁹⁷ An example of this was in the 2000 case of *Adegbola v. Inspector General of Police*,⁵⁹⁸ where the plaintiff was arrested and detained for the offence of wandering by the police and the court held that the police must realize that to

⁵⁹² See United Nations Department for Economic and Social Information and Policy Analysis: The Inequality Predicament - Report on the World Social Situation, 2005 pp. 17-18.

⁵⁹³ Ibid. See also C.O. Adekoya, “Land Use Act and Constitutional Matters Arising” in I.O. Smith (ed) (2003), *The Land Use Act- Twenty Five Years After*, Folar Prints, Lagos p. 19.

⁵⁹⁴ See Stock, Robert. “Nigeria.” *Microsoft Encarta* 2006 [CD].

⁵⁹⁵ Ibid.

⁵⁹⁶ In a report, several people were said to have been arrested randomly on the streets by the police, without reasonable suspicion of having committed any offence. After having been taken to the police station, they were reported to be told as follows: “If you are unable to bail yourself by tomorrow morning, you will be put inside the cell with the criminals and you will be charged to court.” See Christy Anyanwu, *New face of policing in Lagos*, op. cit.

⁵⁹⁷ See Chidi Anselm Odinkalu, “Changing Roles of Civil Society in Promoting Safety and Security in Nigeria,” in Etanbi E.O. Alemika & Innocent C. Chukwuma, (eds) (2004), *Crime and Policing in Nigeria: Challenges and Options*, op. cit. p. 19.

⁵⁹⁸ [2002] 1 NPILR 285.

toy with the fundamental rights of a citizen is a grave issue, and found the police to have violated the right to freedom of movement and liberty of the plaintiff.⁵⁹⁹

This right is also encumbered by the lack of access to affordable transportation. The lack of provisions of infrastructure such as roads and collapse of existing ones have made the right of movement difficult for the poor.⁶⁰⁰ Going to work and accessing social facilities such as health⁶⁰¹ and school are made increasingly difficult by the high cost of transportation. Going to farms and transporting farm produce can be in particular very expensive and sometimes results in losses for poor farmers, with a negative impact on the availability of food.⁶⁰² There are no convenient and affordable public transportation

⁵⁹⁹ It was reported that in most cases police officers were not held accountable for excessive or deadly force or for the deaths of persons in custody. Police generally operated with impunity in the apprehension, illegal detention and sometimes execution of criminal suspects. Several people were killed in Nigeria by the police in the course of exercising their right of movement across the country. In March 2005 a police officer was accused of shooting and killing a bus driver in Makurdi, Benue State, on 13 June, Delta State police officers allegedly beat Peter Osimiri and left him for dead when he refused to pay a \$156 (20,000 naira) bribe demanded of him for carrying eight rolls of electrical cable they believed to be stolen. A passing motorist discovered Osimiri and attempted to take him for medical help, but police saw him en route and beat him again. He died shortly after arriving at the hospital. On 25 December, police officers in the Federal Capital Territory outside Abuja shot and killed a driver who refused to pay a \$0.16 (20 naira) bribe. A retaliatory mob formed and killed an assistant superintendent of police who was driving past the area but had not taken part in the attack. In January 2005 Edo State police stopped a taxi to demand a \$0.30 (40 naira) bribe and killed a passenger after the driver reportedly paid only 20 naira. A Delta State police officer in October 2005 was alleged to have shot and killed a commercial bus driver who was unable to pay a bribe and a police officer was also accused of killing a taxi driver Malam Danjari in Zamfara State in May 2005. See U.S. Department of State, Bureau of Democracy, Human Rights, and Labor 6 March, 2007, Nigeria - Country Reports on Human Rights Practices - 2006 <<http://www.state.gov/g/drl/rls/hrrpt/2006/78751.htm>> accessed 12 January 2008.

⁶⁰⁰ Nigeria has about 200,000km of roads out of which only 60,000km are officially paved, with many of these in very bad shape, poorly maintained and have been decaying for years. Most of the roads have been rendered almost impassable owing to their state of deterioration and have been responsible for the high rate of accidents. Trains in Nigeria have stopped moving on the railways due to neglect. See Lizzie Williams (2005), op. cit. p. 41.

⁶⁰¹ For instance, the parlous state of transportation in Nigeria has been said to result in challenges for the distribution of family planning products, with an estimated 800 active family planning sites at the State and LGA levels (clinics and hospitals) to cover. See Tim O'Hearn (2003), *Nigeria: Assessment of the Transportation System and Distribution Costs for Family Planning Commodities*, prepared for the Federal Ministry of Health, Abuja p. ix. This problem equally affects accessing health facilities such as immunization and treatment.

⁶⁰² An assessment of the farm transportation system to ascertain the availability of transportation for the evacuation of farm produce undertaken in Osun and Oyo states of Nigeria revealed that road conditions are deplorable especially during the rainy season and this causes further wear and tear on the poor condition of vehicles used on the roads and delays in produce delivery. 86.8 percent of produce merchants were found not to own any means of transport and hence they depend on commercial transport, which could be scarce and expensive. The vehicles found on farm routes in the area surveyed include bicycles, cars, buses, pick-up vans and lorries. The study further revealed that 80 percent of the farmers reside at between 4 to 16km from their farms and that 82.4 percent, of the farmers travel between 4 to over 16km to sell their produce. 61.8 percent of the farmers were found to have access to untarred roads, thus making transportation more difficult. See Yahaya Mijinyawa and John Abayomi Adetunji, *Evaluation of Farm Transportation System in Osun and Oyo States of Nigeria*, pdf. p. 1 <<http://ecommons.library.cornell.edu/bitstream/1813/2626/53/LW+05+004+Mijinyawa+final+Nov2005.pdf>> accessed on 20 January 2008. This survey typifies the situation in other parts of the country.

schemes run by the government, which make provision for the young, schoolchildren, workers and the aged. There is a need for the provision of an integrated transport system by the government, which can move large numbers of people; these include buses, trams, trains and metro, the cost of which will be subsidized by the government. This will go a long way to make this right realizable for the teeming poor. The provision of a good network of roads is also *sine qua non*.

It has been noted that the ‘increase in the cost of fuel constitutes one of the biggest impoverishment factors in a country that lacks genuine mass transport – a comprehensive network of railways’⁶⁰³ described as the cheapest means of transport, because hundreds of passengers on a train share the cost of fuel to run it and that fewer people share the cost when they travel by bus.⁶⁰⁴ The government has reportedly backpedaled on the plan to modernize the nation’s railway at the cost of \$8.3billion in conjunction with a Chinese company, preferring to rehabilitate old rail lines, the reason being attributed to lack of funds.⁶⁰⁵ The serious impact of the frequent increases in the prices of petroleum products in Nigeria, earlier discussed can then be better appreciated on the part of the poor. It is common to see people going long distances on foot or waiting along the road and flagging down motorists (while they shout the name of their destinations), in order to get possible assistance in the form of a free ride.

3.8 Right to food

The UDHR in Article 25 provides for the right to a standard of living adequate for the health and well-being of himself and members of his family, including food, clothing, housing and medical care, and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood circumstances beyond his control. The ICESCR in Article 11(1) provides for the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing. Article 11(2) ICESCR further provides for the right of everyone to be free from hunger.

Although the African Charter has no equivalent provision, the African Commission on Human and Peoples’ Rights has interpreted the provisions on the rights to life and health

⁶⁰³ See Shima K. Gyoh, “The Role of Poverty in the Prevention of Diseases”, in D.A. Guobadia and Epiphany Azinge (eds) (2004), op. cit. p. 177.

⁶⁰⁴ Nigeria’s railroads are in a parlous condition; the government is trying to rectify the situation by privatizing the Nigerian Railroad Corporation. This further contributes to worsening the situation of and cost of transportation in Nigeria, and is a major constraint for economic development. See Lizzie Williams, op. cit. p. 41.

⁶⁰⁵ The government was required to pay 10 percent mobilization fees (\$1.3.bn) for the project but has only paid 2.78 percent (\$250) two years after the award of the contract. Oscarline Onwuemenyi, *Railway modernization: FG makes u-turn, to rehabilitate old lines*, The Punch, 26 May 2008
<<http://odili.net/news/source/2008/may/26/408.html>> accessed 26 May 2008.

contained in the African Charter to encompass the right to food.⁶⁰⁶ The right to adequate food is provided under section 16 of the 1999 Constitution as an economic objective only.

As analyzed previously, adequate food is fundamental to sustenance⁶⁰⁷ and lack of access to food has a ripple effect on other rights. For example, hunger or malnutrition, as a result of poverty leads to exhaustion, poor health, illness, inability to afford the cost of medical care, and in the end, death. Lack of food or malnutrition also affects the right to work – in terms of being unproductive owing to lack of strength. As noted under the right to life, food is regarded as the necessary component of this right. Hunger also keeps children out of school and persistent hunger can result in criminal acts such as stealing, as we already covered under the effects of poverty. Right to food also includes the nutrient content of food, as lack of proper nutrition leads to deficiency in protein-calorie, vitamin A, calcium and iron, which can inhibit the proper growth of babies, retarding their intelligence. Iodine deficiency for example is said to be capable of causing mental retardation known as cretinism, while vitamin A deficiency can result in blindness.⁶⁰⁸

According to the Committee on Economic, Social and Cultural Rights, more than 840 million people throughout the world, most of them in developing countries, are chronically hungry.⁶⁰⁹ The Committee observes that while the problems of hunger and malnutrition are often particularly acute in developing countries, as well as malnutrition and under nutrition. Availability of food of sufficient quantity and quality is therefore vital to physical and mental growth, development and maintenance, and physical activity that are necessary for human physiological needs at all stages throughout the life cycle and according to gender and occupation.⁶¹⁰

The deepening food crisis in the world led to the adoption of the Universal Declaration on the Elimination of Hunger and Malnutrition on 16 November 1974 by the World Food Conference⁶¹¹ in Rome. The preamble to that Declaration noted that most of the world's hungry and ill-nourished people live in the developing countries (such as Nigeria).⁶¹² The Declaration also noted that hunger and malnutrition acutely jeopardizes the most fundamental principles and values associated with the right to life and human dignity. The Declaration then proclaims that 'Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and

⁶⁰⁶ See *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para. 64.

⁶⁰⁷ See General Comment 12 (right to adequate food) para 5.

⁶⁰⁸ See Shima K. Gyoh, "The Role of Poverty in the Prevention of Diseases", in D.A. Guobadia and Epiphany Azinge (eds) (2004), op. cit. p. 178.

⁶⁰⁹ See General Comment 12 para 5.

⁶¹⁰ Ibid para 9.

⁶¹¹ Convened under General Assembly Resolution 3180 (XXVIII) of 17 December 1973 and endorsed by General Assembly Resolution 3348 (XXIX) of 17 December 1974.

⁶¹² UN General Assembly in Resolution 3180 (XXVIII) para (a).

maintain their physical and mental faculties.’⁶¹³ Consequent on this Declaration, it has been recognized as a fundamental responsibility of governments to work together and harness resources ‘for higher food production and a more equitable and efficient distribution of food between countries and within countries.’⁶¹⁴

As at 1998, the Committee on Economic, Social and Cultural Rights in its concluding observations on Nigeria’s 1996 report on ICESCR noted that almost 30 percent of Nigerian children suffer malnutrition and its damaging consequences, and that hunger and malnutrition are prevalent in Nigeria.⁶¹⁵ It added that many resort to prostitution to feed themselves.⁶¹⁶ The current global food crisis and the consequent soaring prices of food items will have the most devastating effects on the poor, since one of the fundamental problems of access to food is poverty.⁶¹⁷ The low and middle income earners in Nigeria for instance have been reported to be spending the greater percentage of their income (if not all) on food. The price of food is said to have risen to an unprecedented level, as a recent survey revealed that many food items have increased more than 100 percent and have gone beyond the reach of the poor. Many families are reported to be struggling to eat twice a day.⁶¹⁸

The situation of high cost of food items in Nigeria⁶¹⁹ have made the poor devise a survival strategy of skipping meals in the absence of ability to afford adequate food. The popular formula among the masses as gathered during the fieldwork is either 1-0-0 (meaning taking breakfast and skipping lunch and dinner) or 0-0-1 (i.e. skipping both breakfast and lunch, but taking dinner), with the consequent hunger, malnutrition and health implications for the poor and their families. Coupled with the lack of access to

⁶¹³ Ibid para 1.

⁶¹⁴ See Bertrand G. Ramcharan (2002), *Human Rights and Human Security*, Martinus Nijhoff Publishers, The Hague p. 252.

⁶¹⁵ See E/C.12/1/Add.23 of 13 May 1998 para 24.

⁶¹⁶ Ibid.

⁶¹⁷ See General Comment 12 (right to adequate food) para 5.

⁶¹⁸ See X, *Season of starvation ...Nigerians groan under high food prices*,

Daily Sun, 14 May 2008 at <<http://odili.net/news/source/2008/may/14/503.html>> accessed 14 May 2008.

⁶¹⁹ In 2004 it was estimated that over 40% of Nigeria’s population of the then estimated 130 million people was food insecure and that the food produced by household farms was not adequate. See Raphael Babatunde and Eniola Oyatoye, *Food Security and Marketing Problems in Nigeria*, pdf. <<http://www.tropentag.de/2005/abstracts/posters/102.pdf>> accessed 20 December 2007; in 2005 for example, the Federal Government was reported to have absolved itself of allegations of not doing enough to solve the problem of the high prices of the food items in the country but rather blamed the state governments for their lackadaisical attitude to the issue of preservation of food items under the national programme for food security. See FeedsFarm.com, *Nigeria: Federal Government Blames States for Food Scarcity*, 5 September 2005 at <<http://www.feedsfarm.com/article/ece588a9a60f1064d711204784f563199b8d99ef.html>> accessed 20 December 2007.

medical care, this may mean more loss of lives for the poor. About one-third of Nigerian children are reported to be currently malnourished.⁶²⁰

Some problems have been identified as responsible for the food crisis in Nigeria.⁶²¹ The government should therefore urgently look into the causes and proffer lasting solutions. In the interim the government should make provision for food aid for the poor. The African Commission on Human and Peoples' Rights has stated that the obligation to fulfil rights requires deployment of State resources towards actual realization of the rights and that this could consist of the provision of basic needs such as food or resources that can be used for food (direct food aid).⁶²² The World Bank and the Millennium Development Goals Report for 2008 have reported for instance, that increased food and fuel prices over the past two years may push 100 million people into malnutrition and poverty, and reverse the gains of the last decade on poverty reduction.⁶²³ There is no better time than now for the government to fulfil its obligation in this regard.

3.9 Right to work and labour standards

The UDHR in Article 23 provides for the right of everyone to work, to freedom of choice of employment, to just favourable conditions of work and to protection against unemployment. It also provides for equal pay for equal work and the right to join trade unions for the protection of interest. Article 6 of the ICESCR provides that the States shall recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. Conditions of work are also covered under Article 7 of the ICESCR, while Article 8 provides for trade union rights. Article 15 of the African Charter provides for the right to work under equitable and satisfactory conditions, and section 17 of the 1999 Constitution provides that policy of government shall be towards creating adequate opportunity to secure suitable employment.

⁶²⁰ This was credited to Mr. Ismail Radwan, a Senior Economist with the World Bank, at a conference on microfinance organized by the Central Bank of Nigeria in Abuja on 17 January 2008. See Atser Godwin, op. cit.

⁶²¹ Some of these are the drought experienced in the northern part of the country, rise in prices of seedlings, problems of storage and preservation facilities, inadequate fertilizers, poor technologies and absence of infrastructure. See X, *Season of starvation ...Nigerians groan under high food prices*, op. cit.; Editorial, *Food crisis, not just rice*, The Vanguard, 14 May 2008 at <<http://odili.net/news/source/2008/may/14/317.html>> accessed 14 May 2008.

⁶²² See Communication 155/96 *Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria* para 47.

⁶²³ See The World Bank, *The Global Food Crisis Response Program*, Food and Energy Price Briefing, 9 July 2008 cited in A/63/274 of 13 August 2008 p. 5 note 4, of the interim report of Ms. Magdalena Sepúlveda Carmona, the current mandate holder of the Independent Expert on the question of human rights and extreme poverty; United Nations (2008), *The Millennium Development Goals Report*, New York, p. 5.

Under the causes of poverty above, it was noted that unemployment, low income and lack of unemployment benefits creates poverty or aggravates it: ‘the poor may spend most of their waking hours at the workplace, barely surviving on what they take from it.’⁶²⁴ It was also noted that the inability of an able bodied man willing and ready to work but who remains unemployed causes psychological torture. Lack of employment affects the living standard of the poor, health and ability to cater for family members, including education. It also results in lack of money which results in hunger and the inability to access health services. Under the international covenants, the government is obliged to respect and fulfil this right.

Poor workers in Nigeria, as it is most times the case with the poor in other developing countries, in the informal sectors of the economy suffer a violation of their right to just conditions of work and other labour rights because of employers’ exploitation and refusal to accord them labour rights. Thus the workers are poorly paid, work under unjust conditions⁶²⁵ with no insurance or medical facilities and despite the fact that they are working, they remain trapped in poverty. They continue to work despite the unjust or hazardous working environment as a result of lack of choice and often there are denials of the right to organize to be able to resist injustice and agitate for better working conditions.⁶²⁶

It has been rightly noted that ‘In addition to earning lower average wages, informal workers are seldom provided with social security coverage or other forms of social protection by either their employers or the government. The lack of social protection-encompassing opportunities, resources and services such as health care, pensions, education, skill development, training and childcare-contributes further to the social exclusion of these workers.’⁶²⁷ The labour unions that could fight for the rights of workers are repressed and labour rights are violated with impunity in Nigeria.⁶²⁸

In its concluding observations on Nigeria’s 1996 report on the ICESCR, the Committee on Economic, Social and Cultural Rights expressed concern about repeated violations of the right to strike, often an industrial action for better wages, but these are repressed by government under the guise of State security.⁶²⁹

⁶²⁴ See Report of the Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume I op. cit. p. 7.

⁶²⁵ During the field study on this work, a lawyer stated the case of a young man working in a factory that had his entire hand chopped off by the machine he was working with and the factory offered to pay the worker a paltry sum equivalent to \$640. There was no insurance for the said worker despite the hazardous nature of his work.

⁶²⁶ See X, “Freedom from Poverty”, in Wolfgang Benedek (ed) (2006), *Understanding Human Rights-Manual on Human Rights Education*, Intersentia p. 85.

⁶²⁷ See United Nations Department for Economic and Social Information and Policy Analysis: The Inequality Predicament - Report on the World Social Situation, 2005 p. 32.

⁶²⁸ See O.V.C. Okeme and G.A. Okpara, *Freedom of Association and the Protection of Trade Union Rights in Africa – Nigeria as a Case Study*, *Recht in Africa* 2007: 175 – 197, pp. 177-178.

⁶²⁹ See E/C.12/1/Add.23 of 13 May 1998 para 17.

With the above situations, it is therefore not surprising that a lot of the working populace live in extreme income poverty, no matter how hard they work.⁶³⁰ In Nigeria, there is no right to work and as seen from the different reports above there is a high unemployment rate in Nigeria, thus social and economic security which are very crucial to human security are seriously threatened.⁶³¹ The right to work and rights at work are very important aspects of achieving human security.⁶³² It is thus important for all rights of the poor to be fulfilled and this will create a massive leap out of poverty.

However, one crucial plan of action of dealing with extreme poverty and social exclusion, as recommended by the Independent Expert, Arjun Sengupta, and which Nigerian government must take seriously and act upon in view of the high unemployment rate, is the creation of employment for the poor, vulnerable and marginalized groups, especially in the unorganized sector.⁶³³

3.10 Right to social security

The UDHR in Article 22 provides for social security and in Article 23(1) for unemployment benefits. The ICESCR provides for the right of everyone to social security, including insurance. The African Charter has no provision on social security, but Article 18(2) provides that the State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community. Section 16(1)(d) of the 1999 Constitution under directive principles which cannot be enforced legally, provides for old age care, pensions, sick and unemployment benefits and welfare of the disabled.

There is no social security system in Nigeria,⁶³⁴ such as unemployment benefits, disability insurance, and other sources of income support, which are vital a 'component of strategies for reducing inequality and poverty.'⁶³⁵ Lack of employment coupled with absence of welfare programmes have made life difficult for the unemployed poor, worsening their standard of living and making them slip deeper into the abyss of poverty. Of note as discussed under the effects of poverty is the issue of the soaring rate of crime in Nigeria as a result of the desperation to survive.⁶³⁶ It has been stated that many Nigerians who are poor have developed the attitude that the government is oppressive and indifferent to their situations, that life in their society is meaningless and

⁶³⁰ See Report of the Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume I, op. cit. p. 1.

⁶³¹ See X, "Freedom from Poverty", in Wolfgang Benedek (ed) (2006), op. cit. p. 275.

⁶³² Ibid.

⁶³³ See E/CN.4/2005/49 of 11 February 2005 First Report of the Independent Expert on the question of human rights and extreme poverty, p. 17 para (d).

⁶³⁴ See Concluding observations of the Committee on Economic, Social and Cultural Rights on Nigeria's 1996's report on ICESCR, E/C.12/1/Add.23 of 13 May 1998 para 19.

⁶³⁵ See United Nations Department for Economic and Social Information and Policy Analysis: The Inequality Predicament - Report on the World Social Situation, 2005 pp. 22-23.

⁶³⁶ See Etannibi E.O. Alemika, Poverty, "Social Exclusion and Social Dislocation in Nigeria, in Poverty", in D.A. Guobadia and Epiphany Azinge (eds) (2004), op. cit. p. 121.

unpredictable and that there is no source of support for anyone in need. The said attitude is said to be generating hostility towards society and aggression towards those who are perceived to have benefited from the unjust system.⁶³⁷

In the Vision 2010 Committee Report, it was stated that ‘currently, there are serious problems with Nigeria’s law making, law enforcement and the judicial systems. These hamper the nation’s ability to protect life and property and ensure the liberty of the citizens adequately.’⁶³⁸ During the fieldwork, some of the people expressed the desirability by the government to put in place social security to stem the tide of crime in the country which has reached unprecedented levels in recent times.

It has been said for instance that without social protection, personal injury or economic collapse can catapult families into penury and desperation, as all such losses affect people’s power to fend for themselves.⁶³⁹ It has also been mentioned above that lack of employment and poverty are either bases for or fuel criminality. The Independent Expert on human rights and extreme poverty in her second report recommended among other things, that ‘all legislation should establish the right of all persons falling within its scope to a guaranteed minimum income and should allocate the necessary resources for this purpose.’⁶⁴⁰

Social security is also a way to protect human dignity. It was noted by the Independent Expert on human rights and extreme poverty in her second report that ‘the situation of extremely poor older persons is a tragic one in many countries, and population-aging will only exacerbate it.’ She suggested that ‘specific policies must be devised for these people (reception centres, health policies), in particular the women among them.’⁶⁴¹ The observation of the Vision 2010 Committee coupled with the discussions in this work indicates the urgent need for implementation of the right. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*,⁶⁴² the African Commission on Human and Peoples’ Rights stated that the obligation to fulfil rights requires a more positive expectation on the part of the State to move its machinery towards actual realization of the rights and that this could involve the provision of social security.

3.11 Right to health

The UDHR in Article 25 provides for an adequate standard of living, which includes the right to health. This is covered under the ICESCR in Article 12 which proclaims ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. It also provides for the improvement in all aspects of the environment

⁶³⁷ Ibid p. 122.

⁶³⁸ Ibid See Vision 2010 Committee Report, cited by the author.

⁶³⁹ See Commission on Human Security, *Human Security Now*, op. cit. p. 6.

⁶⁴⁰ See E/CN.4/2000/52 of 25 February 2000, the second report of the Independent Expert on human rights and extreme poverty, p. 4 para i.

⁶⁴¹ Ibid p. 30 para 101.

⁶⁴² See Communication 155/96 para 47.

and industrial hygiene, the creation of conditions which would assure to all medical services and medical attention in the event of sickness (Article 12(2)). Article 16 of the African Charter provides for the right to enjoy the best attainable state of physical and mental health, and obliges States to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. The 1999 Constitution makes no similar provision.

Poverty has serious consequences on the right to health in the absence of medical attention provided by the government for the poor in the event of sickness, no health insurance and money to access both private and government established health institutions. Apart from the discrimination that the poor face in accessing State health institutions, introduction of registration fees, and the cost of drugs and transportation makes the right to health unattainable.⁶⁴³ The consequences of inaccessibility to health are legion for the poor, from death, psychological torture of watching a sick child die as revealed above on account of the inability to afford the cost of treatment, to low productivity, loss of employment owing to persistent illness and dropping out of school.

From the consideration of the indices of poverty, we note that health is wealth as the common saying goes. Some of the effects of poverty on health are reproduced below:

*In my family if anyone becomes seriously ill, we know that we will lose him because we do not even have enough money for food so we cannot buy medicine.*⁶⁴⁴

—Vietnam 1999

*Lack of access to medical services traumatized a mother who found herself “holding and singing lullabies to my baby until she died in my arms.”*⁶⁴⁵

—Philippines 1999

*Take the death of this small boy this morning, for example. The boy died of measles. We all know he could have been cured at the hospital. But the parents had no money and so the boy died a slow and painful death, not of measles, but out of poverty.*⁶⁴⁶ —A man from Ghana, 1995

Poverty and infectious diseases have been described as ‘fellow travelers-each feeding on the other. The poor are at higher risk of infectious disease, and sickness can deepen poverty, creating a vicious cycle of illness and poverty. Especially prevalent among the poor are the first-generation diseases-common infections and maternity-related diseases, mainly affecting children and women. The risk and vulnerability to these poverty-related health threats are compounded by hunger, malnutrition and environmental

⁶⁴³ Shima K. Gyoh, “The Role of Poverty in the Prevention of Diseases”, D.A. Guobadia and Epiphany Azinge (eds) (2004), op. cit. p. 180.

⁶⁴⁴ See Narayan, Deepa, et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p 39.

⁶⁴⁵ Ibid at p 91.

⁶⁴⁶ Ibid at p 32.

threats, especially the lack of clean drinking water and sanitation. A significant share of the world's avoidable deaths and human insecurities is linked to poverty.'⁶⁴⁷

The Special Rapporteur on human rights and extreme poverty stated that 'it has already been shown how living in extreme poverty exposes the very poor to serious health risks. Statistics also show that mortality rates are very high and life expectancy is considerably reduced among very poor populations.'⁶⁴⁸ Pregnancy and childbirth are particularly risky and lack of money makes it generally difficult to get medical treatment. Health services are frequently inaccessible, inadequate and ill-equipped. In addition, the very poor worry about the potential repercussions of medical treatment on other aspects of their lives. One person stated "In my building there is a lady who is in poor health. She has a lung problem and doesn't want to get treatment because her husband can't take care of their four children on his own. She is afraid that the children will be placed in an institution if she goes to hospital.'⁶⁴⁹

Poverty has been noted as the world's greatest killer and the major cause of ill health and suffering.⁶⁵⁰ As indicated under the right to life for instance, malaria kills about 300,000 people every year in Nigeria and together with afflictions by other preventable diseases (diseases of the poor), and lack of access to health care services, death tolls are high for the poor.⁶⁵¹ While the poor cannot afford to access local health services, the elites and their family generally undertake medical treatment and routine medical check-ups overseas and occasionally make use of the high-brow private hospitals available in Nigeria.⁶⁵²

Poverty also has 'many serious long-term consequences - with early childhood deprivation carried forward from one generation to the next. Malnutrition of the baby in the womb results in low birth weight - which in turn leads to higher rates of infant and child mortality, increased likelihood of underweight and stunting and weaker mental and social development. Recent research has shown other serious long-term effects for both women and men. Those malnourished in the womb and during the first two years suffer

⁶⁴⁷ See Commission on Human Security, *Human Security Now*, op. cit. p. 99.

⁶⁴⁸ See the World Health Report, WHO, 1995 cited in Mr. Leandro Despouy, Special Rapporteur in his final report (E/CN.4/Sub.2/1996/13) in para 144.

⁶⁴⁹ See Mr. Leandro Despouy, Special Rapporteur final report (E/CN.4/Sub.2/1996/13), para 144.

⁶⁵⁰ See AFR/RC56/R4 of 1 September 2006 Regional Committee for Africa; Shima K. Gyoh, "The Role of Poverty in the Prevention of Diseases", D.A. Guobadia and Epiphany Azing (eds) (2004), op. cit. p. 180; the burden of HIV/AIDS has also been said to be overwhelmingly concentrated among the poorest people in the poorest regions, especially in Sub-Saharan Africa. See Commission on Human Security, *Human Security Now*, op. cit. p. 98.

⁶⁵¹ See United Nations Department for Economic and Social Information and Policy Analysis: The Inequality Predicament - Report on the World Social Situation, 2005 p. 23.

⁶⁵² See Aminu Maga shi, *Nigeria: Cost of Analysis of Seeking Healthcare Abroad*, allafrica.com, 29 May 2007 accessed 14 May 2008. <http://allafrica.com/stories/200705290359.html>> accessed 14 May 2008; Sebastine Ebhuomhan, *Gani challenges Yar'Adua on foreign treatment*, The Punch, 15 May 2008. <http://www.punchng.com/Articl.aspx?theartic=Art200805153125153>> accessed 15 May 2008; Temple Chima Ubochi, *Medical Treatment Abroad: Is Orji Uzoh Kalu Sick?*, Nigeriaworld, 4 May 2008. <<http://nigeriaworld.com/feature/publication/ubochi/050408.html>> accessed 14 May 2008.

significantly higher rates of heart disease, diabetes and cancer later in life, even in their sixties and seventies.⁶⁵³

According to Nigeria's 2005 poverty profile earlier referred to in this work, which stated that 70 percent of the households in Nigeria use firewood as the main source of fuel for cooking, recent report has indicated the serious consequences of this on people, as a result of exposure to carbon monoxide fumes most of the time. A recent report by the World Health Organisation (WHO), was said to have indicated that indoor air pollution from solid fuels, (including wood, biomass, dung and crop residues and coal) accounted for 1.2 million deaths annually worldwide and this has been linked to many diseases, particularly pneumonia among children and chronic respiratory diseases among adults. Nigeria is reported to be one of the 11 countries worst hit by this health problem.⁶⁵⁴

Coping financially with medical care can further deepen poverty for the poor, as revealed here:

'To cope financially, families initially respond by depleting any savings and by selling their non-productive assets. Children are removed from school, to lower family expenses and to care for the sick. The number and quality of meals are reduced to stretch resources, weakening the ability of the sick to fight off secondary infections. Later, families are forced to sell their land, tools and other productive assets, to borrow money from relatives and friends and to go into debt to money-lenders. These strains continue even after death. Health emergencies like this can precipitate a vicious downward spiral of sickness, compulsory spending, asset depletion and impoverishment.'⁶⁵⁵

The poor in Nigeria, as it is most times the case with the poor in other developing countries, are also faced with the greatest risk of infection and infestation, owing to intolerable living conditions and the crude standard of living, which add up to reduce life expectancy for the poor.⁶⁵⁶ It is for this reason that it has been advised that governments in developing countries should place priority on primary health care,

⁶⁵³ UNDP Report 2000, op. cit. p. 76.

⁶⁵⁴ 'The global health body was reported to have disclosed in Geneva yesterday that in the 21 worst-affected countries, close to 5 percent of deaths and diseases were caused by indoor air pollution.' Nigeria is one of the most affected countries; others are Afghanistan, Angola, Republic of Benin, Burkina Faso, Burundi, Cameroun, Chad, Democratic Republic of Congo, Eritrea, Ethiopia, Madagascar, Malawi, Mali, Mauritania, Niger, Pakistan, Rwanda, Senegal, Sierra Leone, Togo and Uganda. 'In 11 countries, which comprise Afghanistan, Angola, Bangladesh, Burkina Faso, China, the Democratic Republic of the Congo, Ethiopia, India, Pakistan and Tanzania, indoor air pollution accounts for a total of 1.2 million deaths yearly.' The report noted that worldwide, more than three billion people depend on solid fuels, including biomass (wood, dung and crop residues) and coal for cooking and heating. Exposure to indoor air pollution from solid fuels, it stated, had been linked to many diseases, particularly pneumonia among children and chronic respiratory diseases among adults. See Collins Olayinka, *Indoor pollution kills 1.2m in Nigeria, 11 others*, The Guardian, 1 May 2007 <<http://www.guardiannewsngr.com/news/article09>> accessed 1 May, 2007.

⁶⁵⁵ See Commission on Human Security, *Human Security Now*, op. cit. p. 99.

⁶⁵⁶ See Shima K. Gyoh, "The Role of Poverty in the Prevention of Diseases", D.A. Guobadia and Epiphany Azinge (eds) (2004), op. cit. p. 173.

which involves the provision of facilities like housing, water supply, nutrition, environmental sanitation, education, employment for all and caring for vulnerable groups.⁶⁵⁷ The provisions of these complementary services are ordinarily outside the functions of the Ministry of health but have been found to be vital to living in good health and increasing life expectancy.⁶⁵⁸

The impact of the removal of the subsidy for the health sector in 1986 in Nigeria for instance, owing to the implementation of the Structural Adjustment Programme (SAP) by the government led to the introduction of user fees even though this was said to little result in a lot of Nigerians stopping patronizing government hospitals and seeking medical care from quacks. The reason is that as little as the fees were, it affected people who were mostly very low income earners, such that the fees represented a strain on them.⁶⁵⁹

Nigerian public hospitals are grossly under funded and health services are not properly managed, which has resulted in a comatose state of health infrastructure.⁶⁶⁰ Consequently, a great number of people still lack access to primary health care, as most health care centres are located in major cities and towns. Also, health centres are in most cases ill-equipped and understaffed, and generally medication and other medical materials are not available.⁶⁶¹ Patients are in most cases given prescriptions and have to buy drugs and equally have to supply needles, syringes and suture threads in addition to paying for a bed space.⁶⁶² While the WHO recommends that governments should spend a minimum of \$34 per capita on health annually for low income countries, Nigeria has been spending between \$2 - \$5 per capita on health, which is grossly below the minimum recommended.⁶⁶³

Corroborating the effect of parlous state of health care facilities on the poor, Arjun Segupta, the former Independent Expert on the question of human rights and extreme poverty, has indicated in his report that 'low quality of many public health systems lead even the poor to opt for private services. This is in particular the case in rural areas where the health systems are often administered by traditional doctors and under-qualified practitioners.'⁶⁶⁴

⁶⁵⁷ Ibid.

⁶⁵⁸ Ibid.

⁶⁵⁹ Ibid.

⁶⁶⁰ See Concluding observations of the Committee on Economic, Social and Cultural Rights on Nigeria's 1996's report on ICESCR, E/C.12/1/Add.23 of 13 May 1998 para 28.

⁶⁶¹ See Stock, Robert. "Nigeria." *Microsoft Encarta*® 2006 [CD].

⁶⁶² See E/C.12/1/Add.23 of 13 May 1998 para 28.

⁶⁶³ See Edwin Egbede, *Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria*, *Journal of African Law* 51, 2 (2007) 249 – 284, p. 264.

⁶⁶⁴ See A/HRC/5/3 31 May 2007 (his third report) p. 24 para 55.

A combination of poverty and inaccessible health care has resulted in a high infant mortality rate of 99 per 1,000 live births and low life expectancy.⁶⁶⁵ The government has also not been able to successfully tackle other preventable diseases such as 'measles, whooping cough, measles, tuberculosis, polio, cerebrospinal meningitis, gastroenteritis, diarrhea, bronchitis and waterborne infectious diseases such as schistosomiasis'⁶⁶⁶ among others.⁶⁶⁷

Apart from those identified above, the right to health is also linked and contingent on the realization of other human rights, such as rights to education, human dignity, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.⁶⁶⁸ Since the right to health remains illusory for the poor,⁶⁶⁹ they also suffer a lack of a range of other rights as itemized before. It has been stated for instance that people living in extreme poverty are more vulnerable to becoming disabled as a result of a combination of factors, such as lack of access to health care, malnutrition, lack of or inappropriate housing, hazardous occupations, and heightened exposure to violence, which resulted in millions of people being disabled because of lack of access to poliomyelitis which can be prevented through immunization. The costs of rehabilitation often expose persons with disabilities and their families are more exposed to poverty.⁶⁷⁰ Persons with disabilities tend also become or remain impoverished because they are denied the right to work, social security.⁶⁷¹

According to Paul Farmer, 'Anyone who wishes to be considered as humane has the ample cause to consider what it means to be sick and be poor in the era of globalization and scientific advancement.'⁶⁷² It will therefore be necessary for the government to make the accessibility of the poor and disadvantaged sections of Nigerian society to qualitative medical care of utmost importance.

⁶⁶⁵ See Stock, Robert. "Nigeria." *Microsoft Encarta* 2006 [CD].

⁶⁶⁶ Schistosomiasis is a chronic illness that results from an infection of the blood by a parasitic flatworm schistosome. It causes debilitation and can cause liver and intestinal damage. It is most common in Asia, Africa and South America, especially in areas where the water is contaminated by freshwater snails that carry the parasite. See *Encarta Dictionary* Microsoft Encarta 2006.

⁶⁶⁷ See Stock, Robert. "Nigeria." *Microsoft Encarta* 2006 [CD].

⁶⁶⁸ See General Comment 14, (the right to the highest attainable standard of health) para 3.

⁶⁶⁹ *Ibid* at para 5.

⁶⁷⁰ See A/63/274 of 13 August 2008 Interim report of Ms. Magdalena Sepúlveda Carmona, Independent Expert on the question of human rights and extreme poverty, p. 13 paras 39 and 40.

⁶⁷¹ *Ibid*.

⁶⁷² See Paul Farmer (2003), *Pathologies of Power: Health, Human Rights and the New War on the Poor*, University of California Press, Berkeley, p. xvii.

3.12 Right to water

The ICESCR did not provide for right to water but the Committee on Economic, Social and Cultural Rights, has recognized that access to water is a human right.⁶⁷³ The same Committee has stated that the right to water is implicit in Article 11 which provides for ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...’ as the right to water is said to be inextricably linked with the right to health, adequate housing and food.⁶⁷⁴ The right to water is therefore conceived as essential for securing an adequate standard of living and as one of the most fundamental conditions for survival.⁶⁷⁵

The African Charter also did not provide for this right, but the African Commission on Human and Peoples’ Rights has however interpreted the provisions on the rights to life (Article 4) and health (Article 16) contained in the African Charter to encompass the right to food, which implicitly will also cover the right to water.⁶⁷⁶ The 1999 Constitution has no provision on the right to water but provides in section 14(2)(b) that the security and welfare of the people shall be the primary purpose of the government, which will include the provision of basic commodities such as water, since this is essential to people’s welfare.

The ‘right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’⁶⁷⁷ Safeness of the water implies being free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health, and must also be of an acceptable colour, odour and taste for personal or domestic use.⁶⁷⁸

Also, ‘an adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.’⁶⁷⁹ Water is thus linked to a range of other rights and necessary for realizing these rights, such as the right to adequate food (in the preparation of food), right to health (for personal hygiene and the environment) and the right to work (for securing livelihood).⁶⁸⁰

The Committee on Economic, Social and Cultural Rights, has stated that the right to water is indispensable for leading a life in human dignity.⁶⁸¹ But despite the essential

⁶⁷³ See General Comment No. 6 (the economic, social and cultural rights of older persons) para 32, which is said to be implicit in Article 11 of the ICESCR, referring to the right to an adequate standard of living, by the use of the word ‘including’ under Article 11.

⁶⁷⁴ See General Comment 15 (right to water), para 3.

⁶⁷⁵ Ibid.

⁶⁷⁶ See *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para. 64.

⁶⁷⁷ See General Comment 15 (right to water), para 2.

⁶⁷⁸ Ibid at para 12.

⁶⁷⁹ Ibid.

⁶⁸⁰ Ibid at para 6.

⁶⁸¹ Ibid at para 1.

nature of this commodity, there is an acute problem of water supply in the world with over one billion persons lacking access to this basic commodity, while several billion have no access to adequate sanitation, especially in developing countries,⁶⁸² such as Nigeria. Water shortages have been the primary cause of water contamination and diseases linked to water.⁶⁸³ The continuing contamination, depletion and unequal distribution of water has the resultant effect of exacerbating existing poverty.⁶⁸⁴

As depicted above,⁶⁸⁵ many Nigerian communities especially in the rural areas do not have access to basic commodities such as water. The Vision 2010 Committee⁶⁸⁶ set up by past Federal military governments reiterated the fact that quality of life is very poor in the rural communities which accounts for 62 percent of Nigeria's population, owing to extremely inadequate infrastructure. The Committee added that health care is poor and this is compounded by the lack of access to potable water. In the *Voices of the Poor*, the poor in Nigeria also complained about lack of access to water and placed importance on the provision of this essential commodity among others.⁶⁸⁷ In its concluding observations on Nigeria's 1996 report on the ICESCR, the Committee on Economic, Social and Cultural Rights stated that only 49 percent of Nigeria's population has adequate access to clean drinking water.⁶⁸⁸

Lack of access to water is at a greater cost to the poor, as quality time is spent daily (especially by women and children) scouting for water from streams, hand-dug wells, etc., for domestic use. The time spent is then not available for productive activities, such as education, etc.⁶⁸⁹ In some communities in Nigeria the struggle for drinking water from public sources often results in scuffles between people.⁶⁹⁰

Apart from dehydration, lack of access to safe drinking water and adequate sanitation has resulted in contamination and water-related diseases, such as dysentery or bloody diarrhoea, Schistosomiasis, Cholera, typhoid among others which are responsible for the death of millions of people.⁶⁹¹ Those worst hit by water-related contamination and diseases are the poor, both in the rural communities and the urban centres, and they often do not have the financial resources to manage the consequences by having access to health care.⁶⁹² Eighty percent of those who have no improved access to safe drinking water are the rural poor and they also lack the political influence or connection, and the lobbying capacity of those in the urban areas in order to get the government's attention to provide this essential commodity.⁶⁹³

⁶⁸² Ibid.

⁶⁸³ Ibid.

⁶⁸⁴ Ibid.

⁶⁸⁵ See Subtitle 2.3.3 'Lack of good governance' above.

⁶⁸⁶ See Federal Government of Nigeria (1997): Vision 2010 Committee Report, op. cit. p. vi.

⁶⁸⁷ See Narayan, Deepa, et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 37.

⁶⁸⁸ See E/C.12/1/Add.23 of 13 May 1998 para 27.

⁶⁸⁹ See the World Health Organization (2003), *The Right to Water, France*, op. cit. p. 22.

⁶⁹⁰ See Narayan, Deepa, Robert Chambers, Meera Kaul Shah, and Patti Petesch (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 74.

⁶⁹¹ See the World Health Organization (2003), *The Right to Water*, op. cit. p.17.

⁶⁹² Ibid at p. 22.

⁶⁹³ Ibid.

3.13 Right to privacy

This right is provided in Articles 12 of the UDHR and 17 of the ICCPR. Right to privacy is protected in section 37 of the 1999 Constitution, which provides for the right to privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications.

As indicated earlier, those who reside in makeshift buildings, market stalls, or sleep under bridges, in open spaces or uncompleted buildings or slums, inside abandoned vehicles and illegal squatters can hardly be said to have any privacy. They have been described as ‘those with no fixed address and have neither privacy of themselves or correspondence’.⁶⁹⁴ These are the very poor who cannot afford suitable accommodation for themselves and their family. Those who stay in overcrowded houses can only enjoy little or no privacy. Mr. Leandro Despouy, Special Rapporteur on human rights and extreme poverty painted the situation thus:

‘The lack of adequate housing will affect health conditions, security and privacy. It has been said in a report that ‘invasion of the privacy of very poor families knows no bounds. However, the accounts received illustrate, if further proof is necessary, just how unrealistic it is to speak of this right in reference to people living on the pavements of large cities, who have no fixed abode or live crowded together in shanty towns or tiny one-room apartments.’⁶⁹⁵

3.14 Right to housing

Article 25 of the UDHR provides for the right to an adequate standard of living, including housing. Article 23 of the ICCPR provides for protection of the family. The ICESCR in Article 11 equally provides for an adequate standard of living, including housing. Although the African Charter does not explicitly provide for a right to housing, the African Commission on Human and Peoples’ Rights has interpreted the provisions of Articles 14 (right to health), 16 (right to property), 18(1) (protection of the family by the State) to read into the Charter, a right to shelter or housing.⁶⁹⁶ The right to adequate shelter is provided under section 16 of the 1999 Constitution as an economic objective.

According to the Committee on Economic, Social and Cultural Rights, the right to housing also entails the right to live somewhere in security - adequate security, adequate lighting and ventilation, adequate and provision of housing subsidies for those who are unable to obtain affordable housing.⁶⁹⁷ In order to make housing affordable, tenants are

⁶⁹⁴ See Mr. Leandro Despouy (E/CN.4/Sub.2/1996/13), op. cit. paras 152 and 154.

⁶⁹⁵ Ibid.

⁶⁹⁶ See Communication 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/ Nigeria* para 60.

⁶⁹⁷ See CESCR, General Comment 4 the right to adequate housing) para 7.

to be protected by appropriate means against unreasonable rent levels or rent increases.⁶⁹⁸

Although successive governments in Nigeria have made efforts in the past to provide houses or plots of land for people as part of development plans, through the establishment of Housing Corporations and Property Development companies the schemes designed for the masses have achieved only indifferent levels of success.⁶⁹⁹ The main victims of the inequitable housing provision in Nigeria has been said to be the poor, both in the urban and rural areas.⁷⁰⁰ This situation of failure of public housing delivery in Nigeria is a reflection of the lack of appreciation of the nexus between housing and poverty in poverty alleviation programmes.⁷⁰¹

The problem of adequate housing for the poor is acute in Nigeria. The Nigeria's Poverty Profile for 2005 for instance stated that about two-thirds (66.0 percent) of the households in Nigeria live in single rooms. In this type of housing, there are always acute problems of social convenience like decent toilets, bathrooms and kitchens, which may not be provided at all or are overstretched owing to overcrowding, with the attendant health consequences. In single room apartments for instance, a family of seven to nine may be living in it, and in the event of outbreak of diseases, it is difficult to control. Currently, about 72 million Nigerians are reported to be lacking adequate housing.⁷⁰²

In the *Voice of the Poor*, the places where poor people live have been described as 'congested in the urban areas, risk ridden from pollution, flood, wind, landslides, sewage and crime.' The report went on to state that 'those who live in "places of the poor" are frequently insecure in person and property. Most poor people can find only "places of the poor" in which to live. These places then keep them poor.'⁷⁰³

The poor are also reported to be 'disadvantaged and endangered by the places and physical conditions where they live and work. They often experience: problems with water that is scarce, inaccessible and unsafe; isolation with bad roads and inadequate transport; precarious shelter; scarcities of energy for cooking and heating; and poor sanitation. Poor communities are typically neglected, lacking the infrastructure and services provided for the better off. Access to services often costs poor people more'⁷⁰⁴ The fact that the communities where the poor live are often neglected was reflected in the Vision 2010 Report as stated above. This perhaps formed part of the reasons the WHO Director General Dr. Margaret Chan, recently stated that 'If we want better health

⁶⁹⁸ Ibid para 8 (c).

⁶⁹⁹ See Andrew G. Onokerhoraye, "Housing and Poverty in Nigeria: Issues and Problems", in D.A. Guobadia and Epiphany Azing (eds) (2004), op. cit. p. 144.

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid.

⁷⁰² See Collins Olayinka, *72 million Nigerians lack decent housing, says minister*, The Guardian, 9 April 2008 at <<http://odili.net/news/source/2008/apr/9/29.html>> accessed 9 April 2008.

⁷⁰³ See Narayan, Deepa, Robert Chambers, Meera Kaul Shah, and Patti Petesch (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 71.

⁷⁰⁴ Ibid.

to work as a poverty reduction strategy, we must reach the poor. This is the acid test.⁷⁰⁵ This is based on the fact that inaccessible places the poor live create 'bottlenecks or gaps in getting health care treatment to poor and remote populations.'⁷⁰⁶

In its concluding observations on Nigeria's 1996 report on the ICESCR, the Committee on Economic, Social and Cultural Rights lamented the acute housing problem in Nigeria and bemoaned the number of homeless people, noting that 'decent housing is scarce and expensive, which force the poor to live in make-shift cheap dumps or shelters in appalling and degrading conditions representing both physical and mental illness hazards.'⁷⁰⁷ There are no council flats or other easily accessible housing scheme for the poor and the less privileged, making the rents of available houses very expensive. The poor are also prone to insecurity of housing which 'stem from legal or arbitrary evictions or inability to pay even a minimal rent regularly.'⁷⁰⁸

It is thus common to see people sleeping in open/unsafe spaces such as uncompleted buildings, parks, market stalls, slums, abandoned vehicles and under bridges in Nigeria. Such places have adverse health effects on the people and they are also exposed to rape (for women and young girls)⁷⁰⁹ crimes, drugs, ritual killings and murder, kidnapping, violence (sexual and physical), HIV/AIDS and so on. This also has negative social consequences for children raised in such an environment. The precariousness of housing and the wandering existence for the poor have been said to also sometimes result in hindering 'regular school attendance and hamper children's intellectual and physical development through lack of stability, lack of space, an unhealthy environment, overcrowding, noise, etc.'⁷¹⁰

The precariousness of the housing conditions and itinerant living pattern of the poor have been said to result in their being 'those least often covered by vaccination campaigns although they are the ones most exposed to disease.'⁷¹¹ In addition, the poor who are squatters on government land, or who were alleged to have built without documents/town planning permits, or in unauthorized places are either forcefully evicted or are threatened with eviction, contrary to the Guidelines on the Practice of Forced Evictions.⁷¹² Sometimes the poor are evicted without being given warning/adequate warning, compensation or resettlement and legal redress is not usually

⁷⁰⁵ See Special Programme for Research & Training in Tropical Diseases (TDR)/WHO, TDRnews No 78 p 6 at the 30^{-year} anniversary of TDR session, 19-21 June 2007. The TDR's Joint Coordinating Board (JCB) endorsed a new strategy that strengthens and expands the TDR's focus on prevention and control of 'infectious diseases of poverty'.

⁷⁰⁶ Ibid.

⁷⁰⁷ See E/C.12/1/Add.23 of 13 May 1998 para 27.

⁷⁰⁸ See Mr. Leandro Despouy (E/CN.4/Sub.2/1996/13), op. cit. para 129.

⁷⁰⁹ See E/C.12/1/Add.23 of 13 May 1998 para 23.

⁷¹⁰ Ibid para 135.

⁷¹¹ Ibid para 145.

⁷¹² See The Practice of Forced Evictions: Comprehensive Human Rights Guidelines on the Practice of Forced Evictions Geneva, 11-13 June 1977. In General Comment 4 (1991), the Committee on Economic, Social and Cultural Rights, on the right to adequate housing stated that '...all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.' para 8 (a).

provided for those evicted.⁷¹³ The poor and the socially disadvantaged are often the victims of forced evictions, while the elites are hardly ever victims.⁷¹⁴

In the last eight years, there was no welfare housing scheme for the poor provided by the Federal Government of Nigeria and most State governments. Houses, where they were built by the government are sold for very high prices that only the rich can afford and there are no mortgages to facilitate access to them by the less privileged. This situation has led to the increase in slums, especially in the urban centres and homelessness.⁷¹⁵

Evictions may also have adverse effects on the social and cultural life of the family and disrupts the education of children, as they may be forced to relocate to a distant location or to another town altogether. The children may be compelled to stay with someone else in the neighbourhood for the purpose of continuing school and may further be exposed to social vices, like forced labour, street trading, child trafficking and prostitution.⁷¹⁶ It is the duty of the government to ensure that evictions do not result in people being rendered homeless or vulnerable to the violation of other human rights.⁷¹⁷ The government is to further ensure that necessary measures are taken to provide alternative housing, resettlement or access to land as may be appropriate, for those who cannot afford to make those provisions by themselves.⁷¹⁸

Also, as discussed under the right to life above, the right to housing has been stated to be an essential component of the right to life and the inability of the government to meet the housing needs of the masses in Nigeria has made it not fulfil this right or the obligations under the ICESCR.

3.15 Right to participate in social and cultural life

Article 22 of the UDHR provides that every member of society, has the right to social and cultural rights indispensable for his dignity and the free development of his personality. Also, the ICESCR in Article 15 provides for the right to take part in cultural life. Article 22 of the African Charter provides for the right of the people to their economic, social and cultural development. Section 17(3)(C) of the 1999 Constitution provides that the policy of the State shall be directed towards ensuring that ‘...there are adequate facilities for leisure and for social, religious and cultural life’, but they are not protected as rights.

⁷¹³ See Office of the High Commissioner for Human Rights, Fact Sheet No. 25, Forced Evictions para 9.

⁷¹⁴ See Paul D. Ocheje, “*In the Public Interest*”: *Forced Evictions, Land Rights and Human Development in Africa*, *Journal of African Law*, 51, 2 (2007) 175-214 p. 179.

⁷¹⁵ *Ibid.*

⁷¹⁶ See Mr. Leandro Despouy (E/CN.4/Sub.2/1996/13), *op. cit.* para 129.

⁷¹⁷ See General Comment 7 (on the right to adequate housing: forced evictions (Article 11(1)), para 16.

⁷¹⁸ *Ibid.*

In the *Voices of the Poor*, there are echoes of the poor and their children who could not participate in social or cultural rights of their community as a result of wretchedness and lack of decent clothes to wear. They are often isolated as people don't want to associate with them, owing to their conditions of poverty, and they feel inferior and not usually free in the midst of people of higher social status. The Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, in his final report on human rights and extreme poverty, reported that 'persons living in extreme poverty are sometimes turned away from places of culture'. He gave the example of an individual working with very poor families who had planned to take a group of children to the zoo, but on arriving at the place they were refused entry as a result of the 'appearance of the children'. The Special Rapporteur noted that 'because of such affronts, persons living in extreme poverty are reluctant to take part in social and cultural life, or even in local festivals.'⁷¹⁹

The above also captions the exclusion suffered by the poor in Nigeria and poverty has made the enjoyment of the right to participate difficult if not impossible.

3.16 Right to education

The UDHR in Article 26 provides for the right of everyone to education, which shall be free, at least in the elementary and fundamental stages. Elementary education shall be free and compulsory.' The Article further provides in paragraph 2 that 'education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms...' Article 13 of the ICESCR provides for the same right in more detail, including accessibility to higher education, and the progressive introduction of free education at such level. Fundamental education shall also be encouraged for or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

Article 14 of the ICESCR provides for implementation by States that have not started implementation of compulsory primary education. Article 17 of the African Charter provides for the right to education. Section 18(3)(a), (b), (c) and (d) of the 1999 Constitution provides for free, compulsory and universal primary education, free secondary education, free university education and free adult literacy programme, only as educational objectives. Nigeria is however implementing the Universal Basic Education (UBE),⁷²⁰ but there is an acute shortage of teachers⁷²¹ and its implementation has been criticized.⁷²²

⁷¹⁹ See Mr. Leandro Despouy (E/CN.4/Sub.2/1996/13), op. cit. para 171.

⁷²⁰ The Universal Basic Education (UBE) programme was launched in Nigeria by former President Olusegun Obasanjo on 30th September, 1999 with the main objective of the UBE programme to provide free, universal and compulsory basic education for every Nigerian child aged 6 - 15 years. The implementation guideline released by the Federal Ministry of education in February 2000, revealed that the programme aims at achieving the objectives of the provision of free, universal basic education for every Nigerian child of school-age as well as reducing drastically the incidence of drop out from the formal school system catering for the learning needs of young persons who, for one reason or the other,

According to Koffi Annan's statement previously referred to in this work, he stated in 2000 that about 130 million children don't attend school, half of which live in Nigeria and three other countries.⁷²³ As at 1998 12 million children are estimated to hold one job or another.⁷²⁴ A most recent information reportedly released in September 2007 has it that 'there are still about 60 million adults in Nigeria, 85 percent of them under the age of 35 years who can neither read nor write',⁷²⁵ The report was credited to the papers presented in Abuja, Nigeria by some experts including the Senior Special Assistant to the President on MDGs, Hajiya Amina J. Ibrahim and the Director and Country Representative of the United Nations Education Scientific and Cultural Organisation (UNESCO) among others. The experts were said to have rated Nigeria as having the highest number of illiterates in the world, which made the experts warn that the country might not meet its MDGs of halving illiteracy by the year 2015.

The poor have not been able to access education in Nigeria owing to the cost of uniforms, books, transportation and feeding cost, unofficial fees and so on. For example, 'lack of presentable clothing also keeps children from school; parents said that "poorly dressed children refuse to attend school because other children laugh at their ragged clothing"',⁷²⁶

have had to interrupt their schooling through appropriate forms of complimentary approaches to the provision and promotion of basic education among others. This programme is expected to be a continuation of Universal Primary education, the UPE programme, which was abandoned in 1976. Attempts in the past to provide free education (i.e. Universal Primary education, the UPE programme) whether at the federal or state levels has never been successful due to poor planning and implementation. See Uko-Ayimoh, E.E, Okoh, E, and Omatseye, B.O.J., *Universal Basic Education (UBE) in Nigeria*, (2007) <http://findarticles.com/p/articles/mi_qa3673/is_200707/ai_n19511878/pg_1> accessed 10 January 2008.

⁷²¹ During the launching of the UBE Programme, President Obasanjo blamed the falling standard of education in Nigeria on the acute shortage of qualified teachers at the primary school level. It is reported that about 23 percent of the over 400,000 teachers employed in the nation's primary schools do not possess the Teachers' Grade Two Certificate, even when the National Certificate of Education (NCE) is the minimum educational requirement one should possess to teach in the nation's primary schools. Half baked teachers have therefore seriously affected the quality of education. See Victor Dike, *The State of Education in Nigeria and the Health of the Nation*, <<http://www.africaeconomicanalysis.org/articles/gen/education10204234737htm.html>> accessed 18 January 2008.

⁷²² The former Executive Secretary of the National Human Rights Commission Alhaji Bukhair Bello, while in office faulted the implementation of the Universal Basic Education (UBE), pointing out that political patronage remained its bane. See John-Abba Ogbodo, *Commission flays govt on human rights abuses*, The Guardian, Dec 20, 2005. <<http://odili.net/news/source/2005/dec/20/11.html>> accessed 22 December 2005; see Victor Dike, *The State of Education in Nigeria and the Health of the Nation*, op cit.

⁷²³ Bangladesh, India and Ethiopia.

⁷²⁴ See Concluding observations of the Committee on Economic, Social and Cultural Rights on Nigeria's 1996's report on ICESCR, E/C.12/1/Add.23 of 13 May 1998 para 24.

⁷²⁵ See Kelechi Okoronkwo and Nkechi Onyedika, *Illiteracy still high in Nigeria, says experts*, The Guardian, 27 September 2007 at <<http://www.guardiannewsngr.com/news/article08>> accessed 27 Sept. 2007; Reuben Abati, *Dynasties of poverty and educational challenge*, The Guardian, 4 May 2008. <<http://odili.net/news/source/2008/may/4/18.html>> accessed 5 May 2008.

⁷²⁶ Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 97.

The *Voice of the Poor* states that ‘Access to “free” education becomes class-biased when poor families have to invest in school uniforms, text books, transportation and other fees or when the family needs the child’s labour in order to survive.’⁷²⁷ The costs make the children of the poor drop out of school. Other problems exacerbating the poor not keeping up with the literacy pace in Nigeria are ‘frequent absence of teachers, non-implementation of the mid-day meal scheme and poor quality education.’⁷²⁸

The *Voice of the Poor* also captures the correct position about the fast declining quality of education in public schools in Nigeria when it states that ‘the quality of public education appears to be declining, the rich are opting out of the public system, leading to loss of those with some voice in keeping educational systems functioning; leaving the public education to decay.’⁷²⁹ The truth is that most public schools have been neglected by the government and have not been properly funded, are thus in a parlous state and schoolchildren are crammed into dilapidated classrooms.⁷³⁰ UNESCO has prescribed that a minimum of 26 percent of fiscal allocation should be devoted to education in order to ensure qualitative education, but the government of Nigeria has been devoting less than 10 percent to education, whereas countries like Ghana and South Africa are devoting more than the UNESCO prescription.⁷³¹

Most public schools especially primary and secondary levels are attended by the children of the poor and low income groups. The poor themselves corroborated the true position that public schools have been abandoned for children of the poor and the lower class in Nigeria as follows:⁷³²

Only the children of the poor are in public primary schools now. The big men who run the schools have their children in private schools. —Nigeria 1997

This has made Professor Charles Soludo, the current Governor of the Central Bank of Nigeria, to bemoan the prevailing situation in Nigeria where children of the elite attend very good ‘schools within and outside the country, while children of the “poorest of the poor” are left to attend ill-equipped shanty community schools.’⁷³³ He reportedly added ‘that the academic reality of Nigeria today was a regrettable departure from the practice in the past when the children of the poor and the rich were given the opportunity to learn and compete for excellence without discrimination in a challenging academic environment’. He warned that ‘unless urgent steps were taken to address the rot in the

⁷²⁷ Ibid at p. 96.

⁷²⁸ Ibid at p. 68.

⁷²⁹ See Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 96.

⁷³⁰ See Concluding observations of the Committee on Economic, Social and Cultural Rights on Nigeria’s 1996’s report on ICESCR, E/C.12/1/Add.23 of 13 May 1998 para 24.

⁷³¹ There countries devote more 30 percent of their budget to education. See Chief Gani Fawehinmi (SAN), *The Way the Law Should Go*, Acceptance Speech of Chief Gani Fawehinmi at his swearing in ceremony as a Senior Advocate of Nigeria with eleven (11) others, 10 September 2001 p. 23.

⁷³² See Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 96.

⁷³³ See Fidelis Soriwei, *60% of Nigerian graduates not employable- Soludo*, *The Punch*, 17 February 2008 <<http://odili.net/news/source/2008/feb/17/426.html>> 17 February 2008.

educational system in a fundamental way, the country would be establishing dynasties of poverty that would be carried over into generations.⁷³⁴

Another factor which impedes education for the poor is hunger. Hunger keeps children out of school and affects their performance adversely. It was recorded in a similar poor African country, the situation of depravity faced by children of the poor, as their counterparts in Nigeria who have to attend school and study on an empty stomach, as follows:⁷³⁵

When I leave for school in the mornings I don't have any breakfast. At noon there is no lunch, in the evening I get a little supper, and that is not enough. So when I see another child eating, I watch him, and if he doesn't give me something I think I'm going to die of hunger. —A 10-year-old child, Gabon 1997.

Education as the gateway from poverty to prosperity, from exclusion to inclusion and from exploitation to emancipation,⁷³⁶ is acknowledged by the poor themselves but they nonetheless lack access. Education has several advantages that could assist to catapult the poor out of poverty, because of its link with other factors that keep the poor in the chain of poverty. Many studies for example were said 'to have documented the causal links between food, nutrition, housing, sanitation, health care and education. For example, good health reduces requirements for food and increases its effective use for nutrition. Higher educational attainment has a similar complementary effect on nutrition. Building capabilities in one generation is a means to securing ESC rights in the next—and to eradicating poverty in the long term.'⁷³⁷

Amartya Sen, for example has attributed the achievements in the quality of life of people of China, Sri Lanka and Costa Rica to their government's policies concerning medical care and basic education. Sen also gave an example of the causal link of education to health by citing Kerala in India, which he said is one of the poorer states in that country, with low incomes but nonetheless has the highest life expectancy at birth of 70 years in comparison with an average of 57 percent for the whole of India. The infant mortality rate was also stated to be much lower in Kerala than the Indian average. The reason for the improved quality of life in Kerala over other parts of India was attributed to the fact that Kerala has a much higher literacy rate of 91 percent, as opposed to the Indian average of 52 percent. The literacy rate for females was said to be especially high, at 87 percent compared to the Indian average of 39 percent,⁷³⁸ as a result of which Sen said the people in Kerala have a higher capacity to escape premature mortality.

⁷³⁴ Ibid.

⁷³⁵ Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 29.

⁷³⁶ See Duncan Wilson, "The Right to Education", in Rhona K.M. Smith and Christien van den Anker (eds) (2005), *The Essentials of Human Rights*, London: Hodder Arnold p. 105.

⁷³⁷ UNDP Report 2000 op. cit. p. 76.

⁷³⁸ See Amartya Sen, *Inequality Reexamined*, op. cit. p. 128.

The reason for Kerala's success was given as 'the important space of basic capabilities of that state to be sought in the history of public policy involving education (including female literacy) and health services (including communal medical care), and to some extent, food distribution (including use of public support of food consumption of the rural as well as the urban population), in contrast with the rest of India.'⁷³⁹ This clearly demonstrates the importance of education to human development and poverty reduction.

Education is equally vital to knowing one's rights and exercising/enforcing the same. The poor in Nigeria as noticed above are mostly illiterates who cannot read or write, more so in that the Nigerian Constitution is only written in English Language. It was however gathered during the fieldwork from discussions held with the National Human Rights Commission of Nigeria's official that efforts are being made to translate the Constitution into the three major local languages in Nigeria - Igbo, Hausa and Yoruba. Knowledge of rights under the Constitution will develop rights and enforcement consciousness in the people. As provided under Article 26(2) of the UDHR, education is germane to the strengthening of respect for human rights and fundamental freedom.

The right to education which has been said to be an empowering right, in that 'education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their community'.⁷⁴⁰ During the fieldwork, some of the people interviewed canvassed the need for government to properly and massively fund education, in order to truly liberate poor people. They claimed that without education, liberty is useless. They stressed that at the level of development of Nigeria, education should be free and compulsory up to secondary level, in order to raise a new enlightened generation of people, which was projected for the next 15 to 20 years, who will be very conscious of their rights. They argued that illiteracy and ignorance are among the main reasons why police violate the rights of the people with impunity.

3.17 Right to freedom of expression

The right to freedom of expression is provided in Article 19 of both the UDHR and ICCPR. The right to express and disseminate one's opinions within the law is protected in Article 9 of the African Charter. Section 39 of the 1999 Constitution provides for the right to freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without any let or hindrance, subject to limitations stated under sub-section 3, i.e. for the purpose of maintaining the authority and independence of courts or regulating television or wireless broadcasts and the exhibition of cinematograph films.

⁷³⁹ Ibid.

⁷⁴⁰ See CESCR, General Comment 13 (The Right to Education (Article 13)), UN Doc. HRI/GEN/1/Rev.8, para 1 cited in Wouter Vandenhoe, *Conflicting Economic and Social Rights: The Proportionality Plus Test*, paper presented at the International Conference on Conflicts between Fundamental Rights, Ghent, 15-16 December 2006 p. 11.

This right is fettered for the poor who are mostly illiterate and ignorant, and therefore can hardly express themselves in the English language which is the official language in Nigeria. Education is also vital to expression. The voices of the poor as a result are hardly heard because they lack the education to express themselves. It has been said that 'legal advance does not tell the whole truth: to be poor is still to be powerless and vulnerable'.⁷⁴¹ The poor are often not given a chance to express themselves and if they try to, nobody will listen to them. The right to freedom of expression is crucial to the right to participate and right to participate can only be freely exercised by the poor when they can express their opinion in any decision-making process without fear.⁷⁴²

The government has however muzzled this right by clamping down on the masses who protest unpopular policies of government and the labour unions who champion the rights of the poor are also subjected to censorship of their private telephones, series of arrests, detention and physical attacks. It is common for the government to deny labour union leaders medical attention, after they have been brutalized by law enforcement agencies.⁷⁴³

Thus, the government should properly fund the Universal Basic Education programme⁷⁴⁴ in order to cater for the learning needs of not only young persons who for one reason or another have had to interrupt their schooling as currently covered by the UBE,⁷⁴⁵ but also for those persons who have not received or completed the whole period of their primary education as provided under Article 13 of the ICESCR.

3.18 Right to an effective remedy

Article 8 of the UDHR provides that 'everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental granted him by the Constitution or by law.' The 1999 Constitution also provides in section 46 for the enforcement of the rights provided under Chapter IV, which are mainly civil liberties. The 1999 Constitution does not cover social economic rights, as provided in the ICESCR, but similar provisions are provided under Chapter II of the 1999 Constitution, as directive principles of State policy but are made not justiciable by section 6(C) of the same Constitution. Also in section 17(1)(e) of Chapter II it is provided as a social objective that easy accessibility to the courts shall be secured.

The poor in Nigeria were reported in the *Voice of the Poor*, to have 'complained of inability to obtain justice when wronged'.⁷⁴⁶ Some of the causes are the high cost of going to court, in terms of fees (in terms of legal fees, filing fees and even transportation

⁷⁴¹ UNDP, Human Development Report 2000, op. cit. p. iv.

⁷⁴² Narayan, Deepa, et al. (2000), *Voices of the Poor: Crying Out for Change*, op. cit. p. 182.

⁷⁴³ See O.V.C Okeme and G.A. Okpara, op. cit. pp. 182 – 183.

⁷⁴⁴ See Universal Basic Education programme under the right to education above.

⁷⁴⁵ See Uko-Ayimoh, E.E, Okoh, E, and Omatseye, B.O.J., op. cit.

⁷⁴⁶ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 99.

costs), inability to understand the legal system and the inefficient justice administration system in Nigeria among others. Thus, enforcing fundamental rights guaranteed in the 1999 Constitution is a major difficulty as a result the problem of access to justice, while enforcing social economic rights is currently not feasible under the Nigerian Constitution.⁷⁴⁷

Thus the poor cannot enforce a breach of their rights or protect them by accessing the courts. The challenging position of the poor with respect to accessing justice has been stated according to Hon. Dr. T. Akinola Aguda, as follows:

*'...the poor can hardly be expected to enter the temple of justice to worship therein. The poor man is cheated of his legal right by the state or by members of the ruling upper class who can afford the luxury of litigation in our courts, the poor man may have no option than to forgo the right and await justice from God, which will take a long time to come. Some litigants cannot afford the expenses of legal representation of any kind. The whole system of administration of justice is heavily weighted against the vast majority of the people, who are unable to afford the expense of any search after justice.'*⁷⁴⁸

Thus the poor can hardly have the capability to enforce their fundamental rights through the courts and there is also a lack of legally backed alternative modes of redressing rights violations. The lack of availability of an effective framework for redressing human rights grievances or violations is a breach of the government's duty in this regard,⁷⁴⁹ which breeds impunity and encourages rights violations.

Rightly capturing the impunity that goes with breaches of the rights of the poor in Nigeria, a foremost Nigerian Jurist has stated:

*'The flagrant breaches of constitutional provisions can only be committed without evil consequences if they are committed in regard to the millions of our people who are either socially and/or economically disadvantaged.'*⁷⁵⁰

Technical and cumbersome fundamental rights enforcement procedure requires the use of the services of a lawyer, which the poor cannot afford the cost of in most cases. The slow process of justice in Nigeria affects the poor most, to a very large extent the quality of justice one is able to achieve from judicial proceedings depends to a large extent on how much money one is able to spend on the proceedings.⁷⁵¹

As a result of the high cost of litigation and issue of corruption in Nigeria, 'poor people often show a deep distrust of the legal institutions and generally prefer to avoid

⁷⁴⁷ As section 6 (6) (c) of the 1999 Constitution makes these not justiciable.

⁷⁴⁸ See Hon. Dr. T. Akinola Aguda (1987), *The Jurisprudence of Unequal Justice*, op. cit. pp. 4 and 6.

⁷⁴⁹ See The Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993 in Article 27, on effective remedies.

⁷⁵⁰ See A. Aguda (1992), *The Judicial Process and The Third Republic*, F & A Publisher p. 72.

⁷⁵¹ See A. Aguda (1986), op. cit. p. 12.

involvement. Although there is a social stigma against the law, but more borne out more of the risks that the justice sector presents, where outcome is often determined by bribes or influence. The poor sometimes live in circumstances of perpetual illegality... trading in violation of formal regulations...etc.’⁷⁵²

3.19 Summary

The analysis above indicates that the poor hardly enjoy any of the human rights and neither can they afford to protect against or redress any violation by way of access to justice. Also, the above clearly revealed that a human rights approach to poverty reduction has great prospects if all the rights can be enjoyed and enforced by the poor, because of their potency to make them escape the cycle of poverty.

Nigerian eminent Jurist, Hon. Justice Oputa, once stated that:

‘Many Nigerians are poor at one time or another during their lives but many Nigerians are poor all of their lives. As it is with poverty so it is fast becoming of unemployment...’

The eminent Jurist therefore stated that one of the best tests of the efficacy of the fundamental rights provisions in our Constitution should be whether the rights enshrined therein are accorded the poor, the unemployed, the weak, the oppressed and the defenceless.⁷⁵³

In theory the Constitution of Nigeria in its preamble talks of promoting the good government and welfare of all persons based on the principles of Freedom, Equality and Justice. But in practice, one sees that it is the powerful, the rich and the dominant class that seem to have all the rights, while for the poor, the weak and the down-trodden it seems to be their right to suffer in silence, to be patient and wait for their reward in heaven.⁷⁵⁴

Lack of equality before the law irrespective of means or social status weighs heavily against the poor, because ‘whenever we depart from equality, we rob the poor of more satisfaction than we add to the rich.’⁷⁵⁵

The above averment has been corroborated by the immediate past Chief Justice of Nigeria, Justice Salihu Modibo Alfa Belgore, who accused the elites of using their position, power and influence, to make it difficult for the Constitution to be enforced. He stated that since 1960, nothing had been wrong with the Constitution but the operators, and that members of the elites are making it difficult to enforce the

⁷⁵² See DFID, *Safety, Security and Accessible Justice*, July, 2002, p. 20.

⁷⁵³ See Hon. Justice Chukwudifu Akunne Oputa (1989), op. cit. pp. 66-67.

⁷⁵⁴ Ibid pp. 67-68.

⁷⁵⁵ See A. Appadorai (1975), *The Substance of Politics*, Oxford Uni. Press p. 89.

Constitution and referred to the elites as selfish, noting that the Constitution is a sacred document but that our people do not have respect for it.⁷⁵⁶

Human rights would be fully realized if all human beings had secure access to the objects of these rights; Nigerian society is indeed far from this ideal. Most of the massive under fulfilment of human rights is more or less directly connected to poverty. The connection may be indirect in the case of civil and political rights associated with democratic government and the rule of law.⁷⁵⁷ The connection is direct in the case of basic ESC rights, such as the right to a standard of living adequate to the health and well-being of oneself and one's family, including food, clothing, housing and medical care.⁷⁵⁸ Living in poverty deprives people of economic and social rights, such as the right to health, to an adequate standard of living and the right to education and employment opportunities. Civil and political rights are also affected.⁷⁵⁹

From the above, it is glaring that the providing for fundamental rights provisions in the 1999 Constitution⁷⁶⁰ alone without social rights are deficient and this accounted for why they are unenforceable by the poor or why the poor are not interested in their enforcement. The poor are quick to resign to their fate by saying 'God *dey*' or 'God will judge' as they do not see going to court as a viable option because of the fact they can't afford it and also because of the inability to get any effective remedy through such means.

The position above position is corroborated by the United Nations special procedure mandate holders as follows:

'Our collective experience, through communications and dialogue with States, country visits and thematic studies, clearly points to poverty as a cross cutting issue and a grave human rights challenge. Through our respective mandates, we have witnessed how poverty exacerbates the occurrence of human rights violations, reinforces discrimination against groups and communities, and denies individuals the ability to claim their human rights and seek a remedy.'⁷⁶¹

During the fieldwork, some of those interviewed expressed the view that the fundamental rights provisions are perceived as remedial in nature, notwithstanding the

⁷⁵⁶ See Abiodun Fagbemi, *Belgore blames constitutional crises on elite*, The Guardian, 2 January, 2007. <<http://www.guardiannewsngr.com/news/article06>> accessed 2 January 2007.

⁷⁵⁷ The analyses of the rights above have indicated a direct nexus.

⁷⁵⁸ See Thomas Pogge, "Poverty and Human Rights", in Rhona K.M. Smith and Christien Van den Anker (eds) (2005), *The Essentials of Human Rights*, op. cit. p. 286.

⁷⁵⁹ See Liv Silje Borg, Lindsay Core, Hilde Rusten, and Bente Sofie Bye, *Poverty and Human Rights*, HUMR 4701 p. 1.

⁷⁶⁰ Similar to those in the European Convention of Human Rights, Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and the African Charter.

⁷⁶¹ See Joint statement of special procedure mandate holders (*statement was issued by 37 United Nations special procedures mandate holders*) 'On the occasion of Human Rights Day on 10 December 2006, <http://www.ohchr.org/english/events/day2006/docs/spec_proc_statement.doc> accessed 10 August 2007.

clear provisions of section 46(1) of the 1999 Constitution which provides for the right of access to court for redress if any of the rights 'is being or likely to be contravened'. In other words, an individual must have suffered a violation of the rights and then go to court for a remedy. According to them, the rights were not seen as protective especially by the police and other law enforcement agencies because of the manner in which they violate the people's rights. This means that the law enforcement agents and members of the public need rigorous education about the protective nature of human rights, for them to gain respect.

In the next chapter, the constitutional framework for the enforcement of fundamental rights in Nigeria will be examined to see how easily accessible it is for the poor and the vulnerable, and how adequate the rights are for protecting people in that social class.

CHAPTER 3

LEGAL FRAMEWORK FOR HUMAN RIGHTS ENFORCEMENT IN NIGERIA AND CHALLENGES TO ACCESSING JUSTICE

3.1 CONSTITUTIONAL FRAMEWORK FOR FUNDAMENTAL RIGHTS PROTECTION IN NIGERIA

The first Bill of Rights in Nigeria can be traced to the Independence Constitution of 1960. Shortly before the independence of Nigeria in 1960, when regional governments were introduced by the colonial government, fears were expressed by the minority groups of domination by the major groups. In order to allay their fears and prevent their possible marginalization, the colonial government when enacting the Independence Constitution of 1960 introduced a Bill of Rights in Chapter III (sections 17-32) based on the recommendation of the Minorities Commission, headed by Sir Henry Willink, set up by the colonial government in 1957 to investigate complaints by the minority ethnic groups.

The commission was popularly referred to as the Willink's Commission, named after the head of the Commission and the Commission recommended the inclusion of fundamental rights provisions in the Independence Constitution of 1960 to secure the interest of the minority groups against discrimination. The origin of fundamental rights provisions in Nigerian Constitutions can therefore properly be traced to the Commission's report.⁷⁶² The Bill of Rights is based directly on the text of the European Convention on Human Rights, 1950.⁷⁶³ The Constitution also introduced a political arrangement modelled on the Westminster Parliamentary system and retained the English monarch as the Head of State. In 1963, Nigeria became a Republic, and adopted the 1963 Republican Constitution and did away with the monarchy as the head of its government.⁷⁶⁴

The 1963 Constitution retained the fundamental provisions and on return to democratic governance in 1979, another Constitution came into being; this contained the fundamental rights provisions similar to the provisions in the previous Constitutions. The current 1999 Constitution⁷⁶⁵ came into force on 29 May, 1999, on the return of Nigeria to democratic governance. A dissection of the fundamental rights provisions in the 1999 Constitution and those preceding it indicates that they contain only civil and

⁷⁶² See Chinonye Obiagwu and Chidi Anselm Odinkalu, "Combating Legacies of Colonialism and Militarism", in Abdullahi Ahmed An-Na'im (ed.) (2003), *Human Rights under African Constitutions; Realizing the Promise for Ourselves*, University of Pennsylvania Press; Committee for the Defence of Human Rights (2000), *Boiling Point: A Publication on the Crisis in the Oil Producing Communities in Nigeria*, CDHR, Lagos p. 3; see also, L.N. 228 of 1959 in which statutory instrument No. 1772 was published as an amendment of the Nigerian Constitution (Amendment) Order-in-Council.

⁷⁶³ Ibid.

⁷⁶⁴ See Christof Heyns (ed) (2004), *Human Rights Law in Africa*, Vol. 2, Martinus Nijhoff Publishers p. 1387.

⁷⁶⁵ Available at <<http://www.nigerialaw.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>> accessed 5 February 2008.

political rights. Under the 1999 as well as the 1979 Constitutions, these are contained in Chapter IV, while Chapter II contains what is known as ‘Fundamental Objectives and Directive Principles of State Policy’, which incorporates the economic, social and cultural rights,⁷⁶⁶ but are declared to be non-justiciable.⁷⁶⁷

Nigeria also ratified/acceded to major international and regional instruments on human rights/protection of special groups.⁷⁶⁸ However, the status of such human rights instruments in the domestic legal system is as provided in section 12(1) of the Constitution, which states that ‘No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’⁷⁶⁹ In this regard Nigeria’s domestic legal system operates the ‘Dualist system’ or the indirect system, whereby treaties ratified are not enforceable until the parliament enacts a law to incorporate them into the municipal laws; this is prevalent among commonwealth jurisdictions.⁷⁷⁰ This is in contradistinction to the ‘Monist system’ otherwise called the direct application system, under which any international treaty ratified or acceded to by the State is directly enforceable within the municipal law.⁷⁷¹

Under the ‘Mixed system’ the Constitution of a country usually provides that treaties ratified are enforceable and justiciable as far as they are compatible with national law.⁷⁷² Out of all the human rights instruments, only the African Charter on Human and Peoples’ Rights has so far been incorporated into the Nigerian Constitution by Act No. 2 of 1983 passed by the National Assembly in 1983, as the African Charter on Human and Peoples’ (Ratification and Enforcement) Act, 1983 with a commencement date of 17th

⁷⁶⁶ See Sections 13-24 of the 1999 Constitution.

⁷⁶⁷ See Section 6 (6) (c), and as a result of which those provisions cannot be judicially enforced.

⁷⁶⁸ These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, ratified by Nigeria on 29 July 1993; International Covenant on Civil and Political Rights (ICCPR), 1966, ratified on 29 July 1993; Nigeria has not signed the Optional Protocol (which grants individual access to the Human Rights Committee), and Second Optional Protocol to the ICCPR, 1966, because the death penalty is still retained on the statute books; International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), 1966, ratified on 16 Oct. 1967; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, ratified on 13 June 1985; Optional Protocol to the CEDAW, 1999, ratified on 22 Nov. 2004; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984, ratified on 28 June 2001; Optional Protocol to the CAT, 2002 not yet ratified; Convention on the Rights of the Child (CRC), 1990, ratified on 19 April 1991; Optional Protocol to the CRC on Children in Armed Conflict, 2000 not yet ratified; Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 2000 not yet ratified; Rome Statute of the International Criminal Court, 2002 acceded to on 27 Sep. 2001; Regional instruments include The African Charter on Human and Peoples’ Rights, 1981 ratified on 22 June 1983; the Optional Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights, 1998 ratified on 20 May 2004; African Charter on the Rights and Welfare of the Child, 1990 ratified 23 July 2001; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003 ratified 16 Dec. 2004.

⁷⁶⁹ See *Abacha v. Fawehinmi*, [2000] 6 N.W.L.R. (Pt. 660) p. 228 at p. 288.

⁷⁷⁰ See X, International Treaties and Parliament
<<http://www.aspgnz.orcon.net.nz/Treaties%20and%20Parliament.doc>> accessed 5 January 2008.

⁷⁷¹ Ibid. This is the position in Germany; see Article 25 of the German Constitution of 1949.

⁷⁷² Ibid.

March, 1983. The African Charter is now part of Nigerian laws, as confirmed by the Supreme Court in *Abacha v. Fawehinmi*.⁷⁷³

3.1.1 Legal mechanism for fundamental rights enforcement

It is without argument that procedure breathes life into the substantive law and ensures the effectuation of the fundamental rights contained in the Constitution. It has also been said that fundamental rights and freedoms are not worth the chapter they are written in if they are incapable of being enforced by those affected by their violation.⁷⁷⁴ For the purpose of entertaining suits for the protection and redress of fundamental rights violations, section 46 of the 1999 Constitution confers original jurisdiction on the High Court in a State. The section further empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court in connection with the enforcement of those rights.

The then Chief Justice in 1979 made the current rules, the Fundamental Rights (Enforcement Procedure) Rules, 1979 (hereinafter called ‘the Rules’) pursuant to section 42(3) of the 1979 Constitution. The Rules came into force on 1st January, 1980 and has been in force since then. The 1999 Constitution under section 46(3) provided for similar rules to be made by the Chief Justice of Nigeria, but this has not been done.⁷⁷⁵ The implication of this is that the Rules as existing laws by virtue of section 315 of the 1999 Constitution remain in force until there are new rules made or as the Rules may be modified under the 1999 Constitution.

Although section 46 of the 1999 Constitution confers original jurisdiction on the High Court in a State, it has been held by the Supreme Court in *Jack v. University of Agriculture, Makurdi*,⁷⁷⁶ that both the Federal and State High Courts have concurrent jurisdiction in respect of enforcement of fundamental rights, since Order 1 rule 2 of the Rules defines ‘court’ to mean ‘the Federal High Court or the High Court of a State’, and that an application for fundamental rights enforcement can either be made to the Federal High Court or the High Court of the State in which the breach occurs.

⁷⁷³ [2000] 6 NWLR (Pt.660) 228.

⁷⁷⁴ See Chris Maina Peter, “The Human Rights System: An Overview”, in Sifuni E. Mchome (ed) (2002), *Taking Stock of Human Rights Situation in Africa*, Faculty of Law, University of Dar es Salaam p. 19.

⁷⁷⁵ The non-making of new rules might have been as a result of the fact that the Constitution merely confers discretion on the Chief Justice in making rules for the enforcement of fundamental rights, since the word ‘may’ is used in section 46(3), hence the Rules as an existing law by virtue of section 315 of the 1999 Constitution remain in force until there are new rules made or as the Rules might be modified under the 1999 Constitution.

⁷⁷⁶ [2004] 14 WRN 91; [2004] 5 NWLR (Pt. 865) 208, a similar decision was arrived at by the Court of Appeal in *Exec. Gov. Kwara State v. Lawal*, [2005] 20 WNR 679 and by Lagos High Court in *Fasawe v. A-G., Federation and Others*, Suit No. M/490/2006 [Unreported], in Ikeja Judicial Division before Hon Justice Inumidun E. Akande, ruling of which was delivered on Tuesday 28 November, 2006.

This decision was laid to rest by the Court of Appeal in *Senate of the National Assembly and Others v. Momoh*,⁷⁷⁷ where the court came to a rather confusing decision when it held that both the Federal High Court and the High Court of a State have jurisdiction to entertain matters on breaches of fundamental rights, but that a person who wants to enforce a fundamental right against the Federal Government or authority must go the Federal High Court whereas a person who wishes to enforce a fundamental right against a State Government or authority must go to the High Court of the State.⁷⁷⁸

The Rules can only be invoked where the principal claim is in respect of human rights violation. Where the violation of human rights was a mere appendage to the main claim, the Supreme Court of Nigeria held, in *Tukur v. Government of Taraba State*,⁷⁷⁹ that a party cannot rely on protection under the Rules. On the other hand, where a violation is the principal claim, the Rules can be invoked for other tangential claims.⁷⁸⁰ In *Abacha v. Fawehinmi*,⁷⁸¹ the Supreme Court also held that the procedure for enforcement of rights under the African Charter is the same as that for the enforcement of fundamental rights under the 1999 Constitution.⁷⁸²

It has been opined that the scope of rights protection under domestic law should be expanded to include claims arising under international human rights instruments, whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national Constitutions, legislation or common law.⁷⁸³ But this is however still not the position in Nigeria.

⁷⁷⁷ [1983] 4 NCLR p. 269.

⁷⁷⁸ In *Alhaji Tukur v. Government of Gongola State*,⁷⁷⁸ the Supreme Court further compounded the issue by holding that the jurisdiction of the Federal High Court to enforce fundamental rights was limited by section 42(2) of the Constitution and that the Federal High Court has jurisdiction over human rights issues related to matters listed in section 7 of the Federal High Court Act, 1973 and in the 1979 Constitution in respect of which jurisdiction has been expressly conferred. Also in *Administrator, Benue State v. Abayilo*,⁷⁷⁸ the Supreme Court confirmed that the decision in *Alhaji Tukur*'s case reflects the correct position of the law.

⁷⁷⁹ [1997] 6 NWLR (Pt. 510) p. 549; see also *Awguocha v. Zubair*, [2002] F.W.L.R. (Pt.99) p. 1129.

⁷⁸⁰ See *Dongtoe v. Civil Service Commission, Plateau*, [2001] F.W.L.R. (Pt. 50) p. 1639.

⁷⁸¹ [2000] 6 N.W.L.R. (Pt. 660) 228.

⁷⁸² It has been decided in *Constitutional Rights Project v. The President of the Federal Republic of Nigeria* [Unreported Suit No. M/102/93 judgment delivered on 5 May, 1993 by Honourable Justice M.O. Onalaja of the High Court of Lagos State, Lagos Judicial Division] that the provisions of the African Charter on Human and Peoples' Rights cannot be ousted by local legislation. As laudable as this decision is, it does not serve much purpose as a result of the principle of binding precedent based on the hierarchy of courts, in view of the decision of the Supreme Court in *Abacha v. Fawehinmi*, [2001] 6 N.W.L.R. (Pt. 660) 228 which decided that non-justiciable provisions of Chapter II of the Nigerian Constitution cannot be enforced indirectly through the provisions of the Charter. This means that human rights under the African Charter which are justiciable under the Nigerian Constitution cannot be enforced notwithstanding the fact that the same is covered by the African Charter, which is itself incorporated into Nigerian laws.

⁷⁸³ See Justice Philip Nnaemeka-Agu, 'The Role of Lawyers in the Protection and Advancement of Human Rights', A paper presented during the Law Week Celebration of the Nigerian Bar Association, Imo State, 10 February, 1992 p. 11, cited in Constitutional Rights Project, *Guide to Human Rights Litigation in Nigeria*, 2006 CRP, p. 29.

3.1.2 Procedure for legal redress

In order to embark on legal redress of rights violation under the Rules, an applicant must file an *ex parte* motion for leave to apply for the enforcement of a breach of a fundamental right. The motion must specify the provisions of the Rules under which it is brought, namely Order 1, Rule 2(2) and (3) and any other relevant Orders, the precise content of the relief sought, and a summary of the relevant laws, both domestic and international, to be cited at the hearing of the application. The application for leave must be filed within 12 months from the date when the cause of action arose or any longer period as may be allowed by the court.⁷⁸⁴

In accordance with Order 1, Rule 2(3) of the Rules, the application must be accompanied by a statement containing, the name(s) and description(s) of the applicant(s), a restatement of the relief(s) sought from the court, and a more detailed statement of the grounds for relief. The statement must also be accompanied by an affidavit in support, verifying the relevant facts giving rise to the breach. At the time of filing the statement, copies of the statement and affidavit must be filed simultaneously. The affidavit in support must contain the following, particulars of the deponent, i.e. name, address, citizenship and any other necessary particulars; it must establish the deponent's relationship to the applicant(s); confirm the identity of the applicant(s); explain reasons for any procedural irregularities associated with the application; contain a comprehensive account of the facts that gave rise to the application; conclude with a statement that the deponent swears to the affidavit in good faith.⁷⁸⁵

After obtaining the leave of court, the applicant can now apply for an enforcement order by Motion on Notice (using Form No.1) or by Originating Summons (using Form No.2). The process of seeking leave has been described as an in-built delay mechanism. It has been argued that the granting of leave should stay temporarily other related actions.⁷⁸⁶ Another foremost counsel and human rights activist has described as cumbersome the procedure of the enforcement of fundamental rights by the unnecessary step of applying *ex parte* for permission to enforce the right and that this is capable of introducing unnecessary delay thereby frustrating the fundamental rights of the Nigerian citizens and recommended a review of the procedure.⁷⁸⁷

The above criticisms are founded because under the Rules, granting of leave does not operate as a stay unless the court judge so directs.⁷⁸⁸ Another concern observed by this work which came into view during the fieldwork, has been the likelihood of the court dabbling in the merits of the main application during the consideration of an application for leave. For these reasons, the issue of leave was described as dysfunctional during the fieldwork.

⁷⁸⁴ See Order 2 of the Rules.

⁷⁸⁵ See Constitutional Rights Project, *Guide to Human Rights Litigation in Nigeria*, 2006 at pp. 27-32.

⁷⁸⁶ See Justice Niki Tobi, 'Speedy Trials in the 1990's', *Constitutional Rights Journal* No. 6, p 24 cited in Constitutional Rights Project (2006), *Guide to Human Rights Litigation in Nigeria*, Abuja p. 31.

⁷⁸⁷ See Chief Gani Fawehinmi (SAN) (2001), *The Way Law Should Go*, Nigerian Law Publication, Lagos p. 18.

⁷⁸⁸ See Order 1 Rule 2(6).

The Motion or Summons, together with a copy of the Statement submitted in support of the application for leave, must be served through the court registry on all the persons directly affected in the suit. Unless the court otherwise directs, there must be at least 8 clear days between service of the motion or summons and the hearing date. Before the motion or summons is listed for hearing, the applicant must file an affidavit of service containing the names and addresses of all persons served, along with the place and date of service. If any person directly affected has not been served, the affidavit must state this fact and the reason for the same.⁷⁸⁹

On the hearing date, the hearing may be adjourned if the court is of the opinion that the applicant has improperly or failed to serve any person, whether or not such a person is directly affected by the proceedings. On the other hand, the court may on its direction grant an opportunity to be heard to any person or body that so desires, even if such person has not been properly served. This provision has been said to give the status of *amicus curiae* to practically every Nigerian (which effectively means any interested party, irrespective of nationality) who desires to be heard in the application.⁷⁹⁰

At the hearing of the motion or summons, the court may permit amendments to the statement already filed, and an additional affidavit may be filed, if they address new matters arising out of another party's intention to request permission to amend the previously filed statement and of the substance of the proposed amendment. Copies of the additional affidavit filed must also be served on the other parties to the suit, otherwise the facts relied upon and relief sought at the hearing must be restricted to those included in the statement. Separate applications relating to this may be consolidated by order of the court.⁷⁹¹

Generally, under the Rules, fundamental rights application can be brought to do the following:⁷⁹²

i.) Quash proceedings: in order to question the validity of any order, warrant, commitment, conviction, inquisition or record, the applicant must serve a certified copy thereof, along with a copy of the application, on the Attorney-General of the Federation or of the appropriate State prior to the commencement of the hearing. A Judge may in ruling on an application to quash proceedings direct that such proceedings be quashed forthwith or give other orders as might be appropriate.⁷⁹³

⁷⁸⁹ See Constitutional Rights Project, op. cit. pp. 27 – 32.

⁷⁹⁰ See Justice Philip Nnaemeka-Agu, *The Role of Lawyers in the Protection and Advancement of Human Rights*, a paper presented during the Law Week Celebration of the Nigerian Bar Association, Imo State, 10 February, 1992 p. 21, cited in Constitutional Rights Project (2006), op.cit p. 31.

⁷⁹¹ See Constitutional Rights Project (2006), op. cit. pp. 27 – 32.

⁷⁹² Ibid.

⁷⁹³ See Order 3 Rule 1(2) of the Rules.

ii.) For the production and release of detained persons, in cases of wrongful or unlawful detention: the applicant may be released forthwith on the order of the court and pursuant to the filing of the *ex parte* application for leave.⁷⁹⁴

The court may call for an originating summons or an application for originating summons through a notice of motion (Form 3). There must be at least 5 clear days between the service of the summons or motion (on the person against whom the order for release is sought, as well as individuals that the court deems appropriate) at the hearing date. The *ex parte* application may also be adjourned to give notice to the person or authority against whom the order for release is sought.

On the enforcement of rights, both section 46(2) of the 1999 Constitution and Order 6 Rule 1(1) of the Rules dictate that the court may make such orders, issue such writs and give such directions as it may consider just or appropriate for the purpose of enforcing or seeing the enforcement of constitutionally guaranteed fundamental rights. Although the Rules make no provision for specific remedies, it has been held in *Asemota v. Yesufu*,⁷⁹⁵ that the language implies the availability of certain remedies, i.e. order of *certiorari*, *mandamus* and prohibition, as well as a certain writ, i.e. *habeas corpus*, and this list was by no means intended to be exclusive.⁷⁹⁶ However, under Order 6 Rule 2 any party disobeying a court order may be subject to imprisonment.⁷⁹⁷

In *Dele Giwa v. Inspector General of Police*,⁷⁹⁸ the court awarded monetary compensation to the applicant who had been illegally detained by the police and a public apology was also offered to the applicant. In the Court of Appeal's decision in *Adeyemi Candide-Johnson v. Mrs Esther Edigin*,⁷⁹⁹ the propriety of monetary compensation in fundamental rights violation cases was confirmed; also in *Minister of Internal Affairs v. Shugaba*,⁸⁰⁰ the Supreme Court stated as follows:

'...in cases involving an infraction of fundamental rights of a citizen, the court ought to award such damages as would serve as a deterrent against naked, arrogant, arbitrary and oppressive abuse of power...However, such award must not be excessive.'

In other words, the courts will permit the recovery of damages for violation of rights in addition to the traditional remedies of *certiorari*, *mandamus*, prohibition, declarations and injunctions.

⁷⁹⁴ See Order 4, Rules 2, 3 and 4 of the Rules which set forth the mechanisms by which the court may have a detained person produced in court.

⁷⁹⁵ [1980] Suit No. M/21/80 decision of the State High Court, Abeokuta, cited in Fewehinmi, *Nigerian Law of Habeas Corpus*, p 259 at 307, also referred to in Constitutional Rights Project (2006), op. cit. p. 32.

⁷⁹⁶ See Constitutional Rights Project (2006), op. cit. p. 32.

⁷⁹⁷ See *Fame Publications Ltd. v. Encomium Ventures Ltd.* [2000] 8 N.W.L.R. (Pt.667) p. 105.

⁷⁹⁸ Unreported Suit No FHC/12C/83, cited in Gani Fawehinmi (1989), *Nigerian Press under the Constitution and the Criminal Laws*, Nigerian Law Publications Ltd., p. C479.

⁷⁹⁹ 1991] 1 N.W.L.R. (Pt. 129) 659.

⁸⁰⁰ [1982] 3 N.C.L.R. 915 at 928, per Karibi-Whyte, JSC.

3.2 CHALLENGES MILITATING AGAINST THE POOR IN ENFORCING THEIR HUMAN RIGHTS IN NIGERIA

Despite the Rules specially put in place for fundamental rights enforcement in Nigeria, the poor are confronted with enormous challenges in accessing justice for the enforcement of their rights and other inhibiting factors. Some of the challenges facing the poor in enjoying, protecting and redressing the violation of their rights are:

3.2.1 Ignorance/illiteracy

The Nigerian Constitution is written only in the country's official language, which is English and has not been translated into the major local languages spoken by the local people. Thus, given the level of illiteracy in Nigeria as indicated above, illiterates and even functional illiterates⁸⁰¹ are generally not aware of their fundamental rights as provided in the Constitution or have no knowledge of human rights generally. Thus an individual can hardly enforce rights he/she is ignorant of or take up the cause of others without being aware of those rights.⁸⁰²

It has been rightly stated that ignorance and illiteracy are major obstacles to fundamental rights awareness and enforcement in Nigeria. Justice Suleiman Galadima, JCA rightly noted this when he said, '*... The Constitution may be a common document to those in the course of whose activities it is a regular feature. However, it is no gainsaying that a majority of Nigerians do not know what rights they have, enshrined in the Constitution...*'⁸⁰³

It has been stated for instance that in South Africa, ignorance and poverty have been responsible for preventing too many black people from using the courts to protect their rights;⁸⁰⁴ this aptly represents the position in Nigeria.

During the fieldwork, the majority of the people interviewed expressed the view that a high number of Nigerians are unaware of their rights and as such they cannot enforce violations or protect those rights. A taxi driver interviewed said that although people should not be dealt with arbitrarily, for example by the police, he could not make specific reference to protected human rights or that those rights are embodied in the Constitution. Ignorance and illiteracy thus constitutes a hindrance to the poor's

⁸⁰¹ A person is functionally illiterate if he cannot engage in all those activities in which literacy is required for effective functioning of his group and community and also for enabling him to continue to use reading, writing and calculation for his own and the community's development. See the Organisation for Economic Co-Operation and Development (OECD), Functionally Illiterate, <<http://stats.oecd.org/glossary/detail.asp?ID=1279>> accessed 10 April 2008.

⁸⁰² Barriers to equal access to the courts have been summarized in three ways: 'first, the ignorance barrier; secondly, the economic barrier; and thirdly, the prison or physical barrier.' See X, *Equal Access to Free and Independent Courts*, Extracts from an address delivered by the Honourable Mr. Justice A J Milne, Judge President of the Natal Provincial Division of the Supreme Court, at the annual general meeting of Lawyers for Human Rights held at the University of the Witwatersrand, Johannesburg on 6 August 1983, 100 S. African L.J. 681 (1983) p. 685.

⁸⁰³ See Olisa Agbakoba, SAN and Stanley Ibe (2004), op. cit. p. 4.

⁸⁰⁴ See X, *Equal Access to Free and Independent Courts*, op. cit. p. 683.

enforcing or protecting of their rights because the poor are mostly the ignorant and the illiterate.

3.2.2 Complex court procedure and rules of court that is lawyer-centred

Going through the Rules as outlined above is cumbersome and technical for an average Nigerian to understand. Apart from the fact that illiterates cannot comprehend such provisions, a poor but literate person can hardly successfully make use of the same because of the complexity of the law, such that prospective litigants require the services of counsel,⁸⁰⁵ without which he/she cannot access justice. A lawyer is thus needed as a matter of course to present the case, through appropriate procedure and substantive laws, arguing the case and presenting evidence in accordance with the law.

In Nigeria's 2006 Sixth periodic report to the CEDAW, it was observed that the use of the English language, rather than local languages as the communication medium in court and the complex nature of the court system are barriers to women accessing justice in Nigeria.⁸⁰⁶ This barrier equality applies to men as well. In fact, in the 2006 Assessment of the Integrity and Capacity of the Justice System in three Nigerian States by the United Nations Office on Drugs and Crime, the report indicated that the biggest obstacle to using the courts as perceived by the people is the complexity of the process of courts.⁸⁰⁷

As a result of its complex nature and technicality, the majority of Nigerians do not understand the legal system and thus have little or no confidence in it, as gathered during the fieldwork. This is reflective of the position in some other countries.⁸⁰⁸ A related factor is the way the bar has developed in some countries, which has resulted in giving issues of legal aid and legal awareness a low priority, in order to ensure that lawyers are the only route to the legal system.⁸⁰⁹

⁸⁰⁵ The complexity of court procedure and its hindrance to enforcing rights has made the South African judge Honourable Mr. Justice A J Milne, Judge President of the Natal Provincial Division of the Supreme Court, to call for flexibility, in the following way: 'perhaps we should be more flexible about such court procedure or even the kind of structure of some of our courts'. See X, *Equal Access to Free and Independent Courts*, op. cit. p. 683.

⁸⁰⁶ See CEDAW/C/NGA/6 of 5 October 2006 Sixth periodic report of State Parties - Nigeria, to be examined at the CEDAW's 41st Session 30 June – 18 July, 2008 p. 100.

⁸⁰⁷ See United Nations Office on Drugs and Crime (2006), *Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States*, Technical Assessment Report, January, 2006, United Nations, New York, p. 33.

⁸⁰⁸ A New Zealand Court of Appeal Judge put the position in that country thus: 'My impression is that the general public does not have a good understanding of how the New Zealand justice system operates.' See Richardson, Ivor, *The Courts and Access to Justice*, 31 Victoria u. Wellington L. Rev. 164 (2000) p. 172.

⁸⁰⁹ This has been said to be the position in India and is also reflective of the position in Nigeria. See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), *Supreme but not Infallible-Essays in Honour of the Supreme Court of India*, New Delhi: Oxford University Press, p. 3.

3.2.3 Costs-filing, service fees, legal fees, transport costs

Protecting or enforcing one's right in a court of law in Nigeria can be very expensive. Litigants have to bear several costs, such as filing fees - which in some cases depend on the claim of the plaintiff. Also, the filing fees in Federal High Courts vary from those of the State High Courts and even in State High Courts, filing fees also vary from one state to another. In addition to filing fees, litigants have to bear the legal cost of engaging the services of counsel, and transportation costs to and from court, at each sitting. The poor's inability to bear any expense for transport often constrains the poor to walk to the court.⁸¹⁰

In many states of the federation, the costs of filing fundamental rights enforcement cases are unduly high. In Lagos State High Court, for an action to be filed for a fundamental rights enforcement, a litigant might pay about N7, 500 (approx \$60); to file a simple motion costs N350 (approx \$3), while no payment is required for a claim for a liquidated sum. The Federal High Court fees have recently become astronomical: to file a new action may cost about N50,000 (approx \$400) if one is making a monetary claim, while a simple motion costs about N330 (approx \$3),⁸¹¹ in a country where the minimum wage is N7,500 (approx \$60), and the majority of the people live below the poverty level. In cases of appeal, the appellant has to contend with various fees.⁸¹²

Where a matter being filed includes a claim for a specified sum at the Federal level, some State High Courts require that prospective plaintiffs should pay a certain percentage of that amount in addition to the filing fees. This work advocates that such percentage of claim to be paid should be payable after judgment has been entered for the plaintiff and the judgment is to be executed, not before filing the action.

⁸¹⁰ The extreme poor's lack of resources of livelihood or means to approach or even reach court has been described as the biggest obstacle to justice. See Justice R. K. Abichandani, *Obstacles to Justice and the Suffering Humanity*, <<http://gujarathighcourt.nic.in/Articles/accesstojustice.htm>> accessed 21 August 2007.

⁸¹¹ Under Order 53 Rule 1(1) of the Federal High Court (Civil Procedure) Rules 2000, fees set out in Appendix 2 to the Rules ranging from recovery of a specified sum - not exceeding N20,000 (approx \$160) a filing fee of N1,000 (approx \$8) is payable, for claims exceeding N20,000 but not exceeding N100,000 (approx \$800) the sum of N1,500 (approx \$12) is payable, while for claims exceeding N100,000 but not above N1,000,000 (approx \$8,000) a filing fee of N2,500 (approx \$20) is payable, up to a maximum filing fee of N50,000 (approx \$400). Originating summons costs about N680 (approx \$5), while a motion on notice also costs about N330 (approx \$3), and an *ex parte* motion costs as much as that on notice. All are exclusive of the costs of service, which is calculated per distance, but not less than N100 (approx \$0.8) per each. In other cases, the fees for different motions may increase upwards, depending on the type of application being filed, such that application for a writ of Habeas Corpus is N500 (approx \$4). An aggregation of these fees may be payable by a party filing a suit for the enforcement of his fundamental rights if he is claiming damages for the violation of his right.

⁸¹² Such as the filing fee for a motion for leave to appeal; if appeal is not as of right, a filing fee for notice of appeal where leave is granted, and other filing fees as may be necessary. The fees are specified in the Third Schedule to the Court of Appeal Rules 2002 under Fees in Civil and Criminal Matters, Order 1, Rule 5 and they range from N500 (approx \$4) to N100 (approx \$0.8) per filing of each motion.

The cost of engaging the services of a lawyer in fundamental enforcement cases will cost not less than the sum of N50,000 (approx \$400).⁸¹³ This amount is exclusive of the cost of filing, service and other administrative expenses to be borne by the prospective applicant. All the counsel and human rights NGOs interviewed expressed the view that the number of average Nigerians who can conveniently bear this cost are in the minority. In the same vein, a Technical Report on the Nigerian Court Procedures Project conducted in 2001, litigants generally expressed the view (74.2 percent of the data collected) that lawyers' fees are excessive for poor citizens.⁸¹⁴ In a country with large numbers of poor and ignorant people, the prohibitive costs of accessing justice will make the fundamental rights meaningless. This has encouraged impunity.

In the *Voices of the Poor*, 'transport availability and costs are also said to be major factor inhibiting such access to legal services.' Some of the poor interviewed in that publication averred that "It is difficult to get to the court."⁸¹⁵ Also, in Nigeria's Sixth periodic 2006 report to the CEDAW earlier referred to, the high cost of litigation, including lawyers' fees, inaccessibility of courts of law due to their distance/locations coupled with poor transportation systems were reported as major inhibitive factors for poor/rural women from accessing justice.⁸¹⁶ This report is reflective of the challenge faced by the poor in accessing justice in Nigeria irrespective of gender.

The cost of attending court sittings, either as a witness for prosecution in criminal matters or as plaintiff in civil matters can be challenging to the poor. During the fieldwork, the Director of Public Prosecutions (DPP) at one of the State's Ministry of Justice informed this work that sometimes they have to pay transportation costs for poor people to attend court to give evidence in matters in which they are the victims. The DPP added that the government has to resort to rendering this financial assistance because victims of crimes who are poor have been abandoning prosecution of crimes owing to their inability to afford the cost of attending court sittings.

According to the fieldwork, most lawyers and human rights activists interviewed were of the view that the enforcement of rights in Nigeria primarily depends on going to court and that since enforcement of rights has not been channelled through other bodies which can be relied upon, people still have to rely on the judicial approach. It was further argued that human rights violators in most cases are the people in authority who are rich and have the power, such that the poor cannot challenge them, unless legal aid assistance is given to them.

The fieldwork also gathered that people who are aware of their fundamental rights do not identify with the rights, as they perceive those rights as something outside them, which cannot be enforced. According to some of the people interviewed, poverty has

⁸¹³ During the fieldwork on this work in Nigeria, the consensus among the lawyers interviewed was that, to brief a counsel to handle a fundamental rights enforcement matter in court will cost not less than N50,000 (about \$400), in counsel fees alone.

⁸¹⁴ I.A. Ayua, and D.A. Guobadia (eds) (2001), *op. cit.* p. 43.

⁸¹⁵ See Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, *op. cit.* p. 77.

⁸¹⁶ See CEDAW/C/NGA/6 of 5 October 2006 Sixth periodic report of State Parties - Nigeria, to be examined at the CEDAW's 41st Session 30 June – 18 July 2008 p. 100.

made a nonsense of the word ‘right’ itself, which ordinarily means: that to which a person has a just and valid claim and can be asserted. They expressed the view that without the power of enforcement, the poor cannot claim any right. As a result of the expensive nature of litigation in Nigeria, it has been posited that:

*‘the poor can hardly be expected to enter the temple of justice to worship therein and not even the ‘not-too-poor can hardly be expected to pursue his legal rights to a successful end in the system we run, even where he has a ‘good case’...The question you will ask me is who is to blame? The major blame must be put at the foot of economic structure of the whole society...’*⁸¹⁷

On the importance of justice, Hon. Oputa, JSC., has stated that, *‘if we accept the intrinsic worth of every human being, then justice becomes the minimum we owe him; for if we deny him justice, we have declared him worthless...’*⁸¹⁸ This view presupposes that machinery must be put in place for the poor to be able to access justice, irrespective of lack of financial means to access courts, otherwise we declare the poor worthless.

3.2.4 Strict application of *locus standi* rule

Locus standi deals with the right or competence of a person to institute proceedings in a court of law for redress or assertion of a right enforceable in law. This concept is predicated on the assumption that no court is obliged to provide for a claim in which the applicant has a remote, hypothetical or no interest. In fundamental enforcement cases, it is the person whose right has been, is being or is likely to be breached who can bring such an action to court in Nigeria.⁸¹⁹

The constitutional basis for the *locus standi* in Nigeria can be found in Section 6(6)(b) of the 1999 Constitution, in respect of which someone can only approach the court ‘for the determination of any question as to the civil rights and obligations of that person’, such that only the person whose right is threatened or infringed can apply to court for redress.⁸²⁰ Section 6(6) comes to question when a litigant invokes the jurisdiction of the court, in order to determine whether to allow access to the court. The courts in Nigeria have been strict on the application of this rule by granting hearings only to people whose fundamental rights are for determination before the court. The court will thus not ordinarily entertain an action that is brought on behalf of another person, irrespective of the social status of the person.

⁸¹⁷ See Hon. Dr. T. Akinola Aguda (1987), op. cit. p. 4.

⁸¹⁸ See Hon. Justice Nasir Ajanah (2003), *Access to Justice- Problems and Solutions*, Nigerian Bar Association Annual Conference, pp. 1-2.

⁸¹⁹ See *Shugaba v. Attorney General of Federation*, [1982] 3 N.L.C.L.R. p.895; *University of Ilorin v. Oluwadare*, [2003] 3 N.W.L.R. (Pt.806) p.557, see further, Akin Ibidapo-Obe, *Enforcement of Rights and the Problem of Locus Standi in Nigeria*, (2003) 2 UNAD L.J. 113-132, p. 120.

⁸²⁰ Related to this provision are sections 36(1) and 46. Section 36(1) which deals with the right to fair hearing and provides for someone’s ‘determination of his civil rights and obligations’, while section 41 provides for the right of anyone to go to court for ‘any person who alleges that any of the provisions of the Constitution has been, or is being or likely to be contrived’ ...for redress.’

In *Adesanya v. President of Nigeria*,⁸²¹ it was held that before a person can maintain a suit, he or she must disclose his or her personal interest in the matter. The strict application of this rule in the above case and cases decided after it (later referred to herein) has created major impediments for human rights NGOs or individual activists to bring actions to enforce generic or group rights because of the requirement of having to show in the circumstances a special interest in such matter. As held in the *Adesanya's* case, even individual victims that are required to disclose a sufficient personal interest in the matter hardly ever succeed because such personal interest has to be over and above those of general members of the public. The judicial misconceptions of the decision in the case referred to has largely frustrated the enforcement of fundamental rights in Nigeria for the poor by public spirited people.⁸²²

Nigeria's apex court has adopted a strict conservatism to the issue of *locus standi* by not liberalizing it, on the premise that doing so will open the floodgate of litigation to busybodies.⁸²³ By refusing to give a robust interpretation of *locus standi* that will encompass everyone who is suing to protect the right of another, in order to allow public spirited individuals and groups to assist the poor by bringing cases before the court on their behalf, the courts are shutting out the poor with a cause from justice.⁸²⁴ *Locus standi* is the first step in having access to justice under the rules as in other civil actions, and liberalizing the rule is crucial to granting wide access to justice.⁸²⁵

The Supreme Court attempted to broaden the restrictive interpretation of *locus standi* as enunciated in *Adesanya's* case in its decision in *Fawehinmi v. Akilu*,⁸²⁶ in which the welcome development of the law has been affirmed by the apex court in the second

⁸²¹ [1981] 2 NCLR 358.

⁸²² See Chinonye Obiagwu and Chidi Anselm Odinkalu, "Combating Legacies of Colonialism and Militarism", in Abdullahi Ahmed An-Na'im (ed.) (2003) op. cit. p. 233.

⁸²³ *Adesanya v. President of Nigeria (supra)* In *Senator Abraham Adesanya v. The President of the Federal Republic of Nigeria*, (1981) 1 All N.L.R. (Part I) 1) the Court (per Fatai-Williams, CJN, advocated judicial activism by indicating a preference for granting access to a party to court to be heard rather than refusing access, as non-access will stimulate the free-for-all in the media as to which law is constituted and which is not. See Hon Justice Kayode Eso (1990), *Thoughts on Law and Jurisprudence*, MIJ Professional Publishers Ltd, Lagos p. 60, but the overall judgment of the court boiled down to conservatism which has pervaded the courts' interpretation of the Constitution in Nigeria. Ibid.

⁸²⁴ See Hon Justice Kayode Eso (1990), op cit p. 109.

⁸²⁵ See John E. Bonine, *Standing to Sue: The First Step in Access to Justice*, <<http://www.law.mercer.edu/elaw/standingtalk.html>> accessed 10 July 2007. According to this author, there are three basic ways to grant standing. These three areas are: judge-made standing law, constitutional standing and statutory standing.

⁸²⁶ [1987] 4 N.W.L.R. (Pt.67) p.797 at p. 847 the Supreme Court in an attempt to relax the strict application of *locus standi*, by introducing the brother's keeper principle, which is a shift from its extreme conservatism, it however distinguished between criminal and civil proceedings. The court stated that 'The peace of the society is the responsibility of all persons in the country and as far as protection against crime is concerned, every person in the society is each other's keeper. Since we are all brothers in the society, we are our brother's keeper. If we pause a little and cast our minds to the happening in the world, the rationale for this rule will become apparent.' Per Obaseki J.S.C. on which basis the apex court differentiated *locus standi* in criminal cases from the one in civil cases. See Hon Justice Kayode Eso (1990), op cit p. 212.

series of the same case in *Fawehinmi v. Akilu (No.2)*,⁸²⁷ but unfortunately the apex court in doing this distinguished between civil and criminal cases, with the effect that only in criminal matters is the rule a bit liberalized.⁸²⁸ This is because even in criminal matters, the courts still require a party to disclose personal interest or close bond with the victim of rights violation,⁸²⁹ so the current position is thus a relapse to the earlier strict interpretation in *Adesanya's* case.

In the 2006 case of *Theophilus Uwalaka & 2 Ors v. Police Service Commission*,⁸³⁰ a human rights NGO instituted an action on behalf of two others as applicants, seeking an order of *mandamus* to compel the respondent to investigate the allegation of bribery/extortion and other investigative malpractices alleged against some police officers, which the respondent had refused or neglected to investigate. The court held that although the 1st and 2nd applicants could maintain the suit against the respondent, the 3rd applicant (the NGO) had no *locus standi* to institute the action for itself and on behalf of the 1st and 2nd applicants, as its civil rights or obligations were not in danger and that the 3rd applicant had no dispute or quarrel against the respondent. The case typifies the setback that the issue of *locus standi* is giving to human rights NGOs in their bid to assist the indigent to enforce their rights.

It is thus necessary that 'there should be a very broad and liberal interpretation of Section 6(6) to make it accord with the preamble to the Constitution and a relax of the extreme legalism and the undue rigidity involved in the concept of *locus standi* at least where constitutional issues are called in question...'⁸³¹ Given the usual different interpretations of the *locus standi* in some of the cases that have come before the apex court in Nigeria,⁸³² it has been suggested that section 6(6) be amended to put the controversies to rest, and in order to allow more access to the court in constitutional matters.⁸³³

3.2.5 Lack of assertiveness

The poor suffer exclusion, and the lack of a voice as a result of poverty and they often lack assertiveness even if they have access to courts⁸³⁴ to have their human rights enforced.⁸³⁵

⁸²⁷ [1989] 2 NWLR (Pt. 102) p. 122.

⁸²⁸ This is because the narrow confines which section 6(6)(b) restricts have already been broadened by the Criminal Code, the Criminal Procedure Law and the Constitution of Nigeria 1979, based on the various powers of arrest and prosecution conferred by the various sections of the Criminal Procedure Law and the Criminal Code on 'any person'. Private persons can initiate criminal proceedings as provided in s. 59(1) of the Criminal Procedure Act and s. 143(d) of the Criminal Procedure Code.

⁸²⁹ *Fawehinmi v. Akilu (No.2)* (supra).

⁸³⁰ Unreported Suit No. FHC/ABJ/M570/2005, Ruling delivered on 11 July, 2006 by Hon. Justice B.O. Kuewumi, Federal High Court, Abuja.

⁸³¹ See Hon Justice Kayode Eso (1990), op cit p. 211.

⁸³² See *Abraham Adesanya v. The President*, (supra) and *Col. Haliliu & Anor v. Gani Fawehinmi (NO. 2)* (1989) 2 NWLR (Pt. 102) 122.

⁸³³ See Hon Justice Kayode Eso (1990), op cit p. 109.

⁸³⁴ In Nigeria's 2006 report to CEAW-CEDAW/C/NGA/6 of 5 October 2006 Sixth periodic report of State Parties - Nigeria, pdf p.98 to be examined at the CEDAW's 41st Session 30 June – 18 July, 2008

Under the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, Guideline 13 on the right of equal access to justice, it was noted that the most important tool for the poor to defend themselves against human rights abuses is court protection, but that owing to economic or other reasons poor people lack the capability to obtain court protection. And that even if legal assistance is provided for them, they often lack the capacity to assert themselves in courts.⁸³⁶

In a developing country such as Nigeria, the legal process tends to intimidate the litigant, who feels alienated from the system. A poor person, who enters the legal system, whether as a litigant, a witness or a party, may well find the experience traumatic.⁸³⁷ An example of the traumatic experiences of an accused person, as depicted in a film *Aakrosh* by Govind Nihalani, ‘who was too afraid to speak even though the well-meaning lawyer was provided him’, has been cited to illustrate this point.⁸³⁸ Poor litigants thus need a procedure different from the adversarial system that will play an assertive role, separate from the poor litigants.

3.2.6 Corruption

The incidence of corruption which has plagued the judicial system in Nigeria relates to unofficial payments to judges, lawyers, court staff and police with the purpose of obtaining favourable judgments.⁸³⁹

Corruption in the justice administration system in Nigeria takes many forms. These include the acceptance of gratification or other considerations by the presiding judge or magistrate to influence the decision in the case in favour of one of the parties, collusion between litigants (often the plaintiffs) and the court bailiffs, faking actual service of court process and forged endorsements of service in the court records, with the aim of ensuring the non-appearance of the defendant to defend the suit, such that the plaintiff can obtain default judgment against the real defendant, who has no knowledge of the suit.⁸⁴⁰

Also, corrupt practices may characterize every stage of filing and processing new suits before they are assigned for hearing. Litigants may have to pay bribes to court officials

p 98, lack of capacities for asserting rights was noted as one of the factors responsible for the limited access to justice among rural women.

⁸³⁵ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, Asia-Pacific Journal on Human Rights and the Law 2: 136-210, 2002 p. 177.

⁸³⁶ See Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies, Guideline 13 para 192 <<http://www.unhchr.ch/development/povertyfinal.html#guid13>> accessed 12 August 2007.

⁸³⁷ See Ashok H. Desai and S. Muralidhar, “Public Interest Litigation: Potentials and Problems”, in B.H. Kirpal et al. (eds) (2001), op. cit. p. 3

⁸³⁸ Ibid at note 19.

⁸³⁹ See United Nations Office on Drugs and Crime, Assessment of the Integrity and Capacity of the Justice System in three Nigerian States, Technical Assessment Report, 2006, United Nations, New York, 2006 p. 29.

⁸⁴⁰ See A. A. Adeyemi, “The Impact of Corruption on the Administration of Justice in Nigeria”, in I.A. Ayua and D.A. Guobadia (eds) (2001), *Political Reform and Economic Recovery in Nigeria*, Nigerian Institute of Advanced Legal Studies, Lagos p. 681.

for speedy processing of their matters, to get the suit officially recorded in the Registry, to get a writ issued, signed and endorsed, bailiffs to effect service of court processes and the filing of necessary affidavits of service, assignment of cases to the appropriate judge and fixing a date for mentioning of the case in court.⁸⁴¹

The various stages of filing and actual assignment of cases for hearing may be subject to corrupt practices by litigants and their lawyers who offer gratification to court officials and in some cases to the judicial officers themselves, for the purpose of facilitating speedy processing of a process or to obstruct or delay its processing. The choice of judge or magistrate who is to hear the matter may be influenced, with the aim of perverting the course of justice.⁸⁴² In criminal matters, corrupt practices also influence the granting or refusal of bail to accused persons. Bail may sometimes depend on the ability to pay gratification, while accused persons who cannot pay may be denied bail or be given onerous bail conditions, which may be difficult to fulfil.⁸⁴³

Court bailiffs, who are central to service of court processes and the execution of judgments in Nigeria have been particularly identified as the most mischievous and corrupt personnel of the judiciary, who act as barriers to speedy trials and dispensation of justice.⁸⁴⁴

The Justice Kayode Esho Judicial Panel set up in December 1993 by the late dictator, Gen. Sani Abacha, investigated various allegations of corruption against some judicial officers in Nigeria. The Panel report which gave a damning report against some judicial officers, including allegation of misappropriation of exhibit money (in 1984 in the sum of N6,000 (approx. \$48) against a judge, among other corrupt practices, recommended the "withdrawal" of 47 judicial officers comprising eight Chief Judges, 21 High Court Judges and 18 Magistrates.⁸⁴⁵

The report of the Kayode Esho Panel was not considered by the government until eight years later,⁸⁴⁶ during the regime of Olusegun Obasanjo. As a result of the long delay by the government in acting on the panel report, the National Judicial Council (NJC)⁸⁴⁷ set

⁸⁴¹ Ibid at p. 682.

⁸⁴² Ibid.

⁸⁴³ Ibid at p. 685.

⁸⁴⁴ See I.A. Ayua, and D.A. Guobadia (eds) (2001), *Technical Report on the Nigerian Procedures Project*, op. cit. p. 40.

⁸⁴⁵ See Eddy Odivwri and Lilian Okenwa, *Six Judges May be Sacked as FG implements Kayode Esho panel report*, This Day, 16th November, 2004.
<<http://www.thisdayonline.com/archive/2002/09/26/20020926news07.html>> accessed 21 December 2007; see Justice Observatory, *Justice Babalakin Review Committee on Eso Panel's Report: Claims of Fair Hearing Denials are Mischievous*, Access to Justice, Lagos 2004 pp. 57-63.

⁸⁴⁶ The delay occasioned by the government in implementing the recommendations of the Kayode Esho Panel report had resulted in some of the indicted judicial officers being able to escape justice one way or the other, as four of the chief judges recommended for removal had died, while 13 of the judges had retired from service by February 2001 when the National Judicial Council began consideration of the recommendations of the Kyode Esho Panel. See Eddy Odivwri and Lilian Okenwa, op cit.

⁸⁴⁷ A body established by the 1999 Constitution for the appointment, discipline and removal of judicial officers in Nigeria. See section 153(1).

up another five-man committee⁸⁴⁸ which later reviewed the recommendations of the Esho Panel report and confirmed the indictment of two Chief Judges and four High Court Judges, and absolved two other judges of blame.⁸⁴⁹

In the 2006 Assessment of the Integrity and Capacity of the Justice System in three Nigerian States by the United Nations Office on Drugs and Crime, one of the findings was that ‘the more corruption the less the trust; the less trust the more people accept bribery as a given fact when dealing with justice sector institutions.’⁸⁵⁰ As already noted above, corruption in whatever form affects the poor most, and shutting out the poor from access to justice, creates great difficulty for the poor when enforcing their rights.

In the technical report on the Nigerian Court Procedures Project, corrupt personnel were generally agreed among lawyers, litigants and judges, as one of the main causes of trial delays and denial of justice in the civil justice system in Nigeria⁸⁵¹ among others.⁸⁵² In the Annual Report of the Nigeria’s Public Complaints Commission,⁸⁵³ some of the complaints handled included allegations of extortion by court officials, demand for gratifications and suppression of appeal by judicial officer, among others.⁸⁵⁴ The effect of corruption and maltreatment on the poor can be profound and often ‘compounded by a sense of being voiceless and powerless to complain, since complaining may result in losing services altogether.’⁸⁵⁵ The result is that corruption has proved to be a major obstacle to getting justice, as ‘the police and judges, who are supposed to be the guardians of justice’, were seen in the *Voices of the Poor* as the most corrupt.⁸⁵⁶

Public perceptions of the integrity and performance of the justice system are crucial to maintaining respect for the rule of law and the role of the courts in a healthy democracy.⁸⁵⁷ Having one’s case before an independent and impartial court or

⁸⁴⁸ Headed by Chief Babatunde Babalakin, a former Justice of the Supreme Court of Nigeria.

⁸⁴⁹ See Eddy Odivwri and Lilian Okenwa, *op cit*.

⁸⁵⁰ See United Nations Office on Drugs and Crime, Assessment of the Integrity and Capacity of the Justice System in three Nigerian States, Technical Assessment Report, 2006, United Nations, New York, 2006 p. 33.

⁸⁵¹ See I.A. Ayua, and D.A. Guobadia (eds) (2001), *Technical Report on the Nigerian Procedures Project*, *op. cit.* Table 2 and pp. 28 and 39.

⁸⁵² Others are inadequate personnel, poorly trained personnel, poor administrative organization, inadequate infrastructure and resources, deficiency in the system of assigning cases, poor office and court administration by judges, tardiness on the part of counsel, abuse of court procedures, poor conditions of service, inadequate use of time saving procedures and too many cases. See I.A. Ayua, and D.A. Guobadia (eds), see I.A. Ayua, and D.A. Guobadia (eds) (2001), *Technical Report on the Nigerian Procedures Project*, *op. cit.* pp. 28-29 Tables 2 and 3.

⁸⁵³ The Nigeria’s Public Complaints Commission, established in 1975 through Decree No. 31 of 1975 as amended by Decree No. 21 of 1979. The Decree was entrenched in the 1979 Constitution and is now Cap. 377 Laws of the Federation 1990 which is the only body by law which has investigative power over the courts.

⁸⁵⁴ See The Public Complaints Commission Annual Reports for 2004 and 2005.

⁸⁵⁵ See Narayan, Deepa with Raj Patel, et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, *op. cit.* p. 77.

⁸⁵⁶ *Ibid* at p. 184.

⁸⁵⁷ See Richardson, Ivor, *op. cit.* p. 172.

institution is an integral part of right to fair hearing,⁸⁵⁸ which is also an essential ingredient of the right of access to a court or tribunal.⁸⁵⁹ Lack of impartiality and independence of the judiciary is often linked to corruption.⁸⁶⁰ In fact, widespread corruption subverts the entire formal legal system.⁸⁶¹

3.2.7 Inefficient administration of justice

The greatest problem with the Nigerian judiciary is the excruciatingly slow pace of justice - in terms of parties having to be present in courts on countless occasions from the filing of the case before actual conclusion of it.⁸⁶² The Rules were made not only as a guide for bringing fundamental rights enforcement actions, but essentially for speedier hearing of cases than other civil cases. In the technical report on the Nigerian Court Procedures Project conducted in 2001, it was found that civil matters such as personal injuries/tort cases take an average of 3.4 years to be disposed of while family disputes and divorce cases take 2.5 years to conclude.⁸⁶³

The said technical report also found that numerous actual delays in civil proceedings can make a matter be protracted to between 7 to 20 years.⁸⁶⁴ The case of *Wilson Bolaji Olaleye v. NNPC*,⁸⁶⁵ for instance took 13 years before judgment was given and damages awarded to a dead victim of a kerosene explosion and his dependants. In *Ariori v. Elemo*,⁸⁶⁶ the Supreme Court of Nigeria ordered a retrial *de novo* of the case after 20 years of litigation on the ground that the trial High Court's inordinate delay (of 15 years) had occasioned a miscarriage of justice. The report noted other causes of

⁸⁵⁸ The poorest of the poor are frequently the forgotten groups in countries where there is no rule of law; the fight against corruption and for the rule of law is thus a fight for respect for the very poor. See E/CN.4/1999/48 report of the Independent Expert on human rights and extreme poverty, p. 33 para 127.

⁸⁵⁹ See Budlender, Geoff, *Access to Courts*, 121 S. African L.J. 339 (2004) p. 340.

⁸⁶⁰ Efforts of the National Judicial Council (the body responsible for the welfare and discipline of judicial officers in Nigeria) are commendable in tackling corruption in the judiciary, but this work gathered that a lot of bad eggs are still on the bench. In 2004, four judicial officers were removed on account of corrupt practices, three of them while serving as members of the Akwa Ibom State Governorship Election Tribunal, where they were alleged to have received bribes to pervert the course of justice, while the fourth was removed for trying to influence the tribunal to give judgment in favour of one of the parties in the election. Some others have also been removed for corrupt practices.

⁸⁶¹ See S. Muralidhar, (Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, Intersentia, Antwerpen-Oxford, p. 262.

⁸⁶² See United Nations Office on Drugs and Crime, *Assessment of the Integrity and Capacity of the Justice System in three Nigerian States*, Technical Assessment Report, 2006, United Nations, New York, 2006 p. 17.

⁸⁶³ See I.A. Ayua, and D.A. Guobadia (eds) (2001), *Technical Report on the Nigerian Procedures Project*, op. cit. p. 23.

⁸⁶⁴ Ibid.

⁸⁶⁵ Reported summarily in The Guardian of Thursday 3rd July, 1997 and cited in I.A. Ayua, and D.A. Guobadia (eds) (2001), *Technical Report on the Nigerian Procedures Project*, op. cit. p. 23.

⁸⁶⁶ (1981) 1 S.C.N.L. 1 commented upon in I.A. Ayua, and D.A. Guobadia (eds) (2001), *Technical Report on the Nigerian Procedures Project*, op. cit. p. 23.

prolonged delays when matters are adjourned *sine die*.⁸⁶⁷ Trial courts often resort to this procedure when they are awaiting the decision of a superior court (the Supreme Court in most cases) in matters in which issues in respect of interlocutory appeals are pending.⁸⁶⁸ Delay in turnaround time of cases, delayed justice, several adjournments - at the instance of courts and counsel to the parties especially the defendant's counsel, who in most cases is only defending and may not be adversely affected by the delay - are common.⁸⁶⁹

The inefficient administration of justice in Nigeria has further compounded problems for a handful of poor litigants who were fortunate to get free legal assistance but were frustrated in abandoning their matter as a result of the snail-pace justice, no matter how good their cause is.⁸⁷⁰ The effect of the slow pace of justice affects the poor most, who

⁸⁶⁷ Ibid at p. 24.

⁸⁶⁸ Ibid.

⁸⁶⁹ The legal system in Nigeria is primarily based on English common law, with customary law and Sharia law applied in particular disputes. Section 6 of the Constitution of the Federal Republic of Nigeria 1999 vests the judicial power in the courts created by the Constitution. The Supreme Court sits at the top of the hierarchy of the court structure. It has original jurisdiction in any dispute between the Federation and a state or between states if that dispute involves any question on which the existence or extent of a legal right depends, and any other jurisdiction that the National Assembly may confer on it (sec 232). The Supreme Court has exclusive competence to hear appeals, as of right or with leave, from the Court of Appeal (sec 233). Next to the Supreme Court is the Court of Appeal, created by Sec 237, has exclusive jurisdiction to hear appeals from State and Federal High Courts, Sharia and Customary Courts of Appeal (sec 240). The court has original jurisdiction to determine questions regarding the validity of the appointment or term of office of the President or Vice-President. Appeal is available as of right in the matters outlined in Section 241 of the Constitution which include, *inter alia*, appeals involving a question of law, the interpretation of the Constitution or where a sentence of death has been imposed. In the judicial hierarchy next to the Court of Appeal are the State and Federal High Courts. The Federal High Court has wide jurisdiction in civil cases and matters outlined in Section 251 of the Constitution. These include matters relating to, *inter alia*, government revenue, taxation, intellectual property, immigration, and mines and minerals. The court also has such civil and criminal jurisdiction as may be conferred upon it. The Federal Capital Territory of Abuja and each state has a High Court which has criminal and civil jurisdiction to determine cases that arise in its territory or those that are referred to it under its appellate jurisdiction. There is also the National Industrial Court, with coordinate jurisdiction as the High Courts and has jurisdiction over labour and industrial disputes. There are also the Sharia and Customary Courts of Appeal existing in each state and in Abuja. The Sharia Court of Appeal has jurisdiction to determine cases and appeals involving any question of Islamic personal law regarding marriage, guardianship or probate, and where all parties to the proceedings request that the case be decided in the first instance in accordance with Islamic law. Customary Courts of Appeal have jurisdiction to hear appeals in civil proceedings involving questions of customary law, and any other jurisdiction that may be conferred upon it by the National Assembly. There the courts up to the Supreme Court are called superior courts of records. Below the superior courts are several subordinate courts called inferior courts which have been created in each state. These include Magistrate Courts, Area and Upper Courts and Customary Courts. See International Commission of Jurists, Nigeria- Attack on Justice 2000 <http://www.icj.org/news.php3?id_article=2583&lang=en> accessed 25 January 2008; see United Nations Office on Drugs and Crime (2006), *Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States*, op. cit. pp.4-5; Asein, John Ohiereime (1998), *Introduction to Nigerian Legal System*, Sam Bookman Publishers, Ibadan p. 6.

⁸⁷⁰ This researcher has personal experience of two clients who abandoned their matters owing to ceaseless adjournments and the slow pace of justice. The fieldwork also confirms that for even those

cannot fund litigation spanning for a long period of time, thus further resulting in some other 'meritorious claims discouraged' and many others 'never brought'.⁸⁷¹

Affirming the adverse effect of the inefficient administration of justice in Nigeria, Hon. Justice T. Akinola Aguda stated as follows:

*'The whole system of administration of justice is heavily weighted against the vast majority of the people, who are unable to afford the expense of any search after justice. If however the poor is foolhardy enough to enter the temple of justice, he and his family may regret it for the rest of their lives. For in the process-in the pursuit of what he considers to be just- he may become bankrupt and die a pauper. Because, no matter how little a claim may be if one of the parties is a wealthy person or is the State, such a case may traverse eight courts in between 5 and 20 years'.*⁸⁷²

As rightly noted above, a fundamental rights enforcement case may last for an average of five years before the same is concluded or may even be prolonged for as long as the rich defendant wants. The poor thus bear the burden of delayed justice in Nigeria most, as the process of redress is currently dysfunctional.

Criminal trials in Nigeria are also bogged down by inordinate delay and the slow pace of the administration of justice.⁸⁷³ The poor accused persons are the worst affected by having to spend long periods in detention awaiting trial,⁸⁷⁴ especially owing to an inability to afford legal representation. The 2005 Report of the National Working Group on Prison Reforms and Decongestions,⁸⁷⁵ indicated that 64 percent of the inmates of Nigerian prisons are awaiting trial, most of whom have spent between two to fifteen years in prison awaiting trial.

However, in the High Court of Lagos State of Nigeria, case flow in civil litigation has been streamlined, improved and automated, under the Civil Process Improvement & Automation Project commenced in 2006.⁸⁷⁶ Under the automation project, entire civil

that are aware of their rights, they prefer to sleep on their rights when violated than seeking redress in the law courts.

⁸⁷¹ See Weinstein, Jack B., op. cit. 659.

⁸⁷² See Hon. Dr. T. Akinola Aguda (1987), op cit., pp. 4 and 6.

⁸⁷³ In *Garba v. The State*, [1972] 4 S.C. p 118, a case decided 35 years ago, the Supreme Court of Nigeria condemned the inordinate period of two years and two months which the appellant spent in custody before trial. Presently, accused persons spend between five and over ten years in custody before they are tried or released.

⁸⁷⁴ In *Saidu v. The State*, [1982] 4 S.C. p.41, cited in Olisa Agbakoba, SAN and Stanley Ibe (2004) , op. cit. p. 46 the Supreme Court of Nigeria condemned the long period of detention of awaiting trials and stated as follows: *'It does not give the court any joy to see offenders escape the penalty they richly deserve, but until they are proved guilty under the appropriate law in our law courts, they are entitled to walk about in our streets and tread the Nigerian soil and breathe the Nigerian air as free as innocent men and women'.*

⁸⁷⁵ See The Report of the National Working Group on Prison Reforms and Decongestion, February, 2005, Federal Republic of Nigeria, pp. 6-7.

⁸⁷⁶ See Key advantages and benefits of the Lagos CAIS to stakeholders in the administration of justice in Lagos state <http://www.lagosjudiciary.gov.ng/d003/main.aspx?dbName=DB_News192> accessed 20 August 2007.

litigation case flow from filing to final disposition has been improved upon through the Court Automated Information Management System (CAIS), and disposition standards of fundamental rights cases have now been put at within 6 months, while other general civil cases are said to be concluded within 12 months.⁸⁷⁷ The CAIS only covers a few of the judicial divisions in the State.⁸⁷⁸

During the fieldwork, most of the lawyers, human rights activists and human rights NGOs interviewed in Lagos State claimed that in practice, fundamental rights cases are not concluded within 6 months as stipulated and expressed the view that the situation has only improved marginally. They also claimed that human rights are so badly debased in Nigeria because those who mete out rights violations know too well that their victims cannot afford to redress those violations through the court, and that if they ever get assistance to access the courts, they can't afford the many years to prosecute a case, which will make them give up midway. They claimed that this is responsible for the rights of people being violated daily and that owing to the problems of poverty, people get frustrated by following due process which in some cases takes time to materialize.

In a 2006 technical assessment of the Integrity and Capacity of the Justice System earlier referred to, the report indicated that the length of trial was the most serious problem of the country's justice system when compared with other factors hampering justice delivery.⁸⁷⁹ In its findings, the report stated that 'Court users who had more negative perceptions and experience when it came to seeking access to justice, were likely not to use the courts when needed', and that 'inefficient courts are likely to encourage citizens not to seek solutions in accordance with the law but to resort to other, often illicit, means including corruption'.⁸⁸⁰

Only the rich can afford to hire the services of senior lawyers who can use their experience and privilege at the bar to either bring about speedy redress or delay it, to suit the purpose of their clients. For example, the Director-General of Nigeria's National Agency for Food and Drugs, Administration Council (NAFDAC), Prof. Dora Akunyili's experience buttressed this position when he observed that '*Despite the criminality of drug counterfeiting, surprisingly the criminals, who are usually very wealthy very often go scot-free in court. On many occasions, they have used the courts to delay justice and even circumvent it.*'⁸⁸¹

⁸⁷⁷ See Key advantages and benefits of the Lagos CAIS to stakeholders in the administration of justice in Lagos state, Disposition standards of other civil matters, such as matrimonial causes will be concluded within 3 months (undefended), defended within 12 months, while probate and other matters will be concluded within 18 months, revenue matters within 6 months, commercial matters within 12 months and land matters within 24 months.

⁸⁷⁸ Lagos, Ikeja, Ikorodu and Badagry.

⁸⁷⁹ See United Nations Office on Drugs and Crime (2006), *Assessment of the Integrity and Capacity of the Justice System in three Nigerian States*, op. cit. p. 20.

⁸⁸⁰ Ibid at pp. 20 and 22.

⁸⁸¹ See Lemmy Ughegbe, *How Courts impede anti-drug fight*, by Akunyili, The Guardian, 28 November, 2006 <<http://www.guardiannewsngr.com/news/article06>> accessed 20 December 2007.

In a related note, elites in Nigeria have been accused of using their position, power and influence, to make it difficult for the Constitution to be enforced and that they do not have respect for the Constitution,⁸⁸² thus increasing the burden for the poor, whose rights are violated with impunity. The preoccupation of the poor is to ensure the survival of themselves and their family members, such that any other thing, be it human rights, become secondary. Thus, poverty fosters impunity as this discourages redress for violation of rights or makes people give up on their enforcement.

3.2.8 Mistrust

The Special Rapporteur on human rights and extreme poverty, Mr. Leandro Despouy's final report published in 1996, in addition to some of the issues raised above,⁸⁸³ reported mistrust as among the obstacles barring access to justice for the very poor. He stated that this stemmed from their experience of the justice system.⁸⁸⁴ According to the Special Rapporteur, 'Whether they are defendants or accused, they often see their petitions turned against them: "There is a strong possibility that they would be reproached with some unlawful aspect of everyday life quite unrelated to the grounds for the petition; the poorest have learned that, in seeking their due in a given matter, it is often preferable not to be in the wrong in some other respect"'.⁸⁸⁵

In Nigeria for instance, the quality of justice one gets from judicial proceedings depends to a very large extent on how much money one is able to spend on the proceedings.⁸⁸⁶ In the technical report on the Nigerian Court Procedures Project referred to under the right to a fair hearing above, it was generally agreed among litigants and lawyers that the poor are not fairly treated by the civil justice system in Nigeria.⁸⁸⁷ All of these have resulted in the poor losing faith in the courts. There is consequently a low level of public trust in the courts and declining willingness of citizens to use the courts to protect their rights.⁸⁸⁸ Thus the poor don't access the legal system willingly unless they are forced

⁸⁸² The immediate past Chief Justice of Nigeria, Justice Salihu Modibo Alfa Belgore, has accused the elites of using their position, power and influence, to make it difficult for the Constitution to be enforced. He stated that since 1960, nothing had been wrong with the Constitution but the operators, and that members of the elites are making it difficult to enforce the Constitution and referred to the elites as selfish, noting that the Constitution is a sacred document but that our people do not have respect for it. See Abiodun Fagbemi, *Belgore blames constitutional crises on elite*, The Guardian, 2 January, 2007. <<http://www.guardiannewsngr.com/news/article06>> accessed 3rd January 2007.

⁸⁸³ The Special Rapporteur gave six obstacles as some of those barring the poor from access to justice; these are: (i) their indigent condition; (ii) illiteracy and lack of education and information; (iii) the complexity of procedures; (iv) mistrust; (v) the slow pace of justice, and (vi) in many countries, the fact that they are not allowed to be accompanied or represented by solidarity associations which could also bring criminal indemnification proceedings. See Special Rapporteur, Mr. Leandro Despouy's final report on human rights and extreme poverty published in 1996 para 163.

⁸⁸⁴ See Special Rapporteur, Mr. Leandro Despouy's final report (E/CN.4/Sub.2/1996/13), op. cit. para 163.

⁸⁸⁵ Ibid.

⁸⁸⁶ See A. Aguda (1986), op. cit. p. 12.

⁸⁸⁷ See I.A. Ayua and D.A. Guobadia (eds.) (2001), *Technical Project on the Nigerian Court Procedures Project*, op. cit. p. 21.

⁸⁸⁸ See United Nations Office on Drugs and Crime, Assessment of the Integrity and Capacity of the Justice System in three Nigerian States, op. cit. p. 27.

into it by situations of conflict with the law as the accused or as defendant in law suits.⁸⁸⁹ They see the law as an instrument of oppression and try to avoid it.⁸⁹⁰

3.2.9 Incomplete guarantee of rights under the Nigerian Constitution

The classes of rights covered by the 1999 Constitution are limited to civil and political rights, while ESC rights provisions similar to those of the ICESCR are provided in Chapter II but are made aspirational or as social objectives and therefore non-justiciable.⁸⁹¹ Although ESC rights are contained in the African Charter which is now part of Nigerian law, they however cannot be enforced since the Constitution declared such category of rights non-justiciable. An attempt to use the provisions of the African Charter as a platform to enforce the ESC rights in Nigeria has been met with a judicial hammer, since the provisions of the ICESCR have not been incorporated into Nigerian law.⁸⁹²

The non-incorporation of this international human rights covenant into the national laws has greatly limited the classes of rights that can be enjoyed and enforced especially by the poor. ESC rights which have the potential to improve the social and economic situations for the poor can therefore not be claimed. These rights need to be cognizable under national laws in order to form an integral part of the justice and legal administration system.⁸⁹³ The position adopted by the 1999 Constitution is against the principle of indivisibility and interrelatedness of all human rights. ESC rights must therefore be made justiciable in order to ensure expansion and enforcement of the range of human rights in Nigeria, for effective realization of those rights for the poor, as a strategy for poverty reduction.

In the absence of social security or any form of welfare system in Nigeria, the poor who have no means of livelihood can't even contemplate approaching the court to protect their rights. Added to this is that for people that have jobs, they are under the pressure of responsibilities from immediate and extended family members such that they have barely little money left to survive on, and there is practically nothing left for them to want to protect their rights through the court.⁸⁹⁴

The issue of justiciability of ECR rights will be examined in detail later in this work.

⁸⁸⁹ See S. Muralidhar, (Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 261.

⁸⁹⁰ Ibid at p. 262.

⁸⁹¹ See Sections 13-24 of the 1999 Constitution, Fundamental Objectives and Directive Principles of State Policy, and are declared by section 6 (6) (c), as not judicially enforceable.

⁸⁹² See Supreme Court of Nigeria's decision in *Abacha v. Fawehinmi* (supra).

⁸⁹³ See UNDP Report 2000 pp. 7 and 74; see Office of the United Nations High Commissioner for Human Rights, Handbook on National Human Rights Plans of Action, UN New York and Geneva, 29 August 2002 p. 2.

⁸⁹⁴ See Ebenezer O.I. Adodo, "Economic and Social Rights in Nigeria: Looking Beyond the Hurdle of Justiciability", in Human Rights Law Service (ed.) (2005), *Enforcing Economic, Social and Cultural Rights in Nigeria: Rhetorics or Reality?*, HURILAWS, Lagos p. 52.

3.3 Summary

All the above have created impediments for the poor in accessing courts and justice and consequently in protecting and/or enforcing their fundamental rights. Access to courts and justice are vital to protecting and enforcing human rights that are vital to empowerment and to lift the poor out of poverty. This is because life in poverty is not only a violation of economic and social rights, but also of civil, political and cultural rights, and of the right to development.⁸⁹⁵

The reality is that presently in Nigeria, the poor cannot afford the luxury of litigation under the system of justice being run, to redress violation of their rights or to protect them. In view of the Nigerian government's duty under international law to respect, protect, promote and fulfil human rights, this work will discuss next, the current position in Nigeria with regard to assisting the poor to access justice and the adequacy or otherwise of the same.

This is because if the poor cannot access the courts to present their matters effectively, the judiciary also will not be able to perform their duties under the Constitution of protecting rights. So the issue of access to courts/justice is very germane for enforcing rights by the poor.⁸⁹⁶

3.4 THE HUMAN RIGHT OF ACCESS TO JUSTICE

3.4.1 Introduction

The respect and protection of human rights can only be guaranteed if they are buttressed by efficient legal remedy both in international and domestic legal regimes. Crucial to the protection of rights however, is the right to access justice in the event of a violation or breach of any human right.⁸⁹⁷

The term 'Access to Justice' is not expressly defined in most human rights treaties and as a result has been used in a variety of ways in different contexts. It has been stated for instance that the term can be employed in three ways: i.) used generally to refer to the possibility of the individual to bring a claim before a court and to have the matter adjudicated upon, ii.) in a limited sense, it is used to refer to the right of an individual, not only to be able to bring his or claim before a court but to have the claim heard and adjudicated upon in accordance with the standards of principles of fairness and justice, and iii.) in a very restrictive sense, it is used to signify legal aid for those in need, which

⁸⁹⁵ See Special Rapportuer, Mr. Leandro Despouy's final report (E/CN.4/Sub.2/1996/13) paras 175 and 176.

⁸⁹⁶ See Budlender, Geoff, op. cit. p. 355.

⁸⁹⁷ See Francesco Francioni, "The Right of Access to Justice under Customary International Law", in Francesco Francioni (ed.) (2007), *Access to Justice as a Human Right*, Oxford University Press, p. 1.

otherwise would result in their inability to access judicial remedies owing to the often prohibitive cost of legal representation and administration of justice.⁸⁹⁸

The right has also been simply described as meaning essentially the formal right of an aggrieved individual to litigate or defend a claim.⁸⁹⁹

For all its consequence, 'access to justice' has never been, and perhaps can never be, precisely defined, but going by various legal provisions, jurisprudence and views on access to justice, the term has been associated ordinarily with the ability of individuals to effectively access the machinery of justice - that is the court or tribunal - in order to pursue the vindication of their rights as proclaimed by laws or to defend a suit. Owing to the expansive interpretations of the term 'access to justice' from various jurisdictions, it is indicative that the right not only permeates the possibility of an individual to bring a claim before a court and to have the matter heard and determined without any impairment of effective access, it equally extends to the possibility of having the judgment enforced.

In this sense, the term can appropriately be referred to as one affording the judicial protection of rights, with the right of an individual to seek redress before a court or tribunal that is established by law, independently and impartially.⁹⁰⁰ The right of access to justice is not expressly formulated, but is inherent in the fair/due process clauses that are found in all human rights treaties on civil and political rights. Provisions relating to this can be found in Articles 8 and 10 of the UDHR,⁹⁰¹ Article 14(1) of the ICCPR⁹⁰², Articles 6(1)⁹⁰³ and 13⁹⁰⁴ of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Articles 8(1)⁹⁰⁵ (under fair hearing) and

⁸⁹⁸ Ibid.

⁸⁹⁹ See Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 Buff. L. Rev. 1977-1978, p. 183.

⁹⁰⁰ See Francesco Francioni, "The Right of Access to Justice under Customary International Law", in Francesco Francioni (ed.) (2007), op. cit. p. 3.

⁹⁰¹ Article 8 provides, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law", while Article 10 provides 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

⁹⁰² This provides in parts that 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'

⁹⁰³ Article 6(1) provides 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

⁹⁰⁴ Article 13 under right to an effective remedy provides 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

⁹⁰⁵ This provides that 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.'

25⁹⁰⁶ (under judicial protection) of the American Convention on Human Rights and under Article 7(1) of the African Charter.⁹⁰⁷ The 1999 Nigerian Constitution also in Section 6(6)(b) vests adjudicatory powers in the courts for the determination of any question of civil rights and obligations of any person, and Section 46(1) guarantees access to the High Courts in any State for anyone who alleges that his fundamental rights as contained under Chapter IV, are being or are likely to be contravened.

It is essential to note that with respect to Article 6(1) of the ECHR, this did not expressly provide for access to court and thus created uncertainty, with the possibility of the provision being applicable solely to proceedings that are² already pending in a domestic court. This cloud was however lifted in *Golder v. the United Kingdom*,⁹⁰⁸ where the European Court of Human Rights ('the European Court') held that the procedural guarantees laid down in Article 6(1) embody the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect. This judgment of the court is based on the fundamental nature of the right of access to court to vindicate all fundamental rights and freedoms.

3.4.2. Components of the right of access

In view of the provisions in various human rights treaties securing the right of access to court, an examination of the components of this right as gleaned from the case law of several jurisdictions indicate the pulling down of barriers to the essence of the right of access. This has equally given rise to the various elements of this right, a breach of which will constitute a denial of access to justice. These can be categorized as follows:

3.4.2.1 The right to institute proceedings

The case law indicates that the individual must have a right of access to a court for the determination of his or her civil rights and obligations. In this regard the European Court held in *Golder v. the United Kingdom*⁹⁰⁹ that Article 6(1) of the ECHR embodies the right to institute proceedings before courts in civil matters and in *Ashingdane v. the United Kingdom*,⁹¹⁰ it held that it must also be established that the degree of access afforded under the national legislation was sufficient to secure the individual's "right to a court", having regard to the rule of law in democratic society.

⁹⁰⁶ Article 25(1) provides 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.'

⁹⁰⁷ Article 7(1) provides that 'Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.'

⁹⁰⁸ Judgment of 21 February 1975, Series A no. 18, pp. 13-18, paras 28-36.

⁹⁰⁹ *Supra*.

⁹¹⁰ Judgment of 28 May 1985, Series A no. 93, pp. 24-25, para 57.

3.4.2.2 Right of access must be practical and effective

In connection with the above, it has been laid down by the European Court that the right of access to court afforded to individuals by Article 6(1) of ECHR must be practical and effective, and should not be a theoretical or illusory one.⁹¹¹ The requirement of “effectiveness” under Article 6(1) of the ECHR, as interpreted by the European Court has given rise to other elements of this right. In other words, for a right of access to a court to be practical and effective the following must be ensured:

3.4.2.2.1 There should be no factual or legal barriers to access a court

In this sense, there must be no deliberate acts of State authorities impeding the effective exercise of the right of access to a court. A situation where a prospective litigant was prevented by State authorities from contacting a solicitor with the purpose of instituting libel proceedings was held by the European Court to constitute a violation of effective right of access as embodied by Article 6(1) of the ECHR.⁹¹²

The European Court also held that where the positive laws regulating access to court are so complex that the system is not sufficiently coherent and clear, and such complexity is likely to create legal uncertainty, the right of access to court has been held not to be practically effective under Article 6(1) of the ECHR.⁹¹³

3.4.2.2.2 The individual must be able to effectively participate in the trial or proceedings

In this regard, in order to ensure the effective right of access to a court, the European Court in interpreting Article 6(1) of the EHCR held that ‘the person concerned must not only have a right to apply to a court for the determination of his civil rights and obligations, but must also be enabled to present his case properly and satisfactorily, which also requires that the proceedings be organized and conducted in a way that takes into account the intellectual abilities of the parties.’⁹¹⁴ Effective participation is equally applicable in criminal proceedings as held by the European Court in *S.C. v. The United Kingdom*⁹¹⁵ in the sense that the individual should be able to participate effectively in the trial or proceedings, i.e. by being present in person, to hear and follow the proceedings, and have a broad understanding of the nature of the trial process, and of what is at stake for him or her, including the significance of any penalty which may be imposed.

⁹¹¹ See, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 12-14, para 24.

⁹¹² *Golder v. the United Kingdom* (supra).

⁹¹³ See *De Geouffre de la Pradelle v. France*, Judgment of 16 December 1992 paras 31, 33 and 35.

⁹¹⁴ See Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds.) (2006), *Theory and Practice of the European Convention on Human Rights*, Intersentia, p. 560.

⁹¹⁵ Judgment of 15 June 2004 paras 28 and 29.

3.4.2.2.3 Financial obstacles should not impede the right of access

There are instances where financial predicaments may impede the right of access to courts, generally on the grounds of the often prohibitive cost of legal proceedings. This can be either as a result of the inability to afford the costs of retaining legal representation or as a result of an inability to pay the cost of fees in various forms.

In dealing with the issue of legal aid in civil matters, the European Court in *Airey v. Ireland*,⁹¹⁶ recognizes the fact that in guaranteeing the right of access to courts for individuals, States have free choice in determining the means to be used for the purpose of securing effective access to court for the determination of their “civil rights and obligations”. The Court held that although the institution of a legal aid scheme or simplification of the procedure may constitute one of those means, Article 6(1) in itself does not impose an obligation on States to provide free legal aid for every dispute relating to a civil right. The Court therefore held that the absence of legal aid in civil proceedings will not necessarily amount to effective denial of the right of access to a court as this will depend on the particular circumstances.

With respect to criminal matters, legal aid may be given to the accused person where he cannot afford the cost of retaining legal representation. Under Article 6(3)(c) of the ECHR for instance, an accused may be entitled to legal aid where he or she lacks the sufficient means and the interest of justice requires so. Also, Article 8(2)(5) of the American Convention reserves as the inalienable right of the accused that he/she be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law. However in criminal matters the African Charter does not guarantee legal aid to indigent persons.

The African Charter however also does not provide for the right to be assisted by an interpreter (especially in a continent where the majority of the people do not speak the official language of the court and also lack formal education) as found in other human rights treaties, which may be vital to effective participation in court proceedings.

Legal aid is usually not provided for indigent persons in most jurisdictions. On the issue of legal aid in civil proceedings, the European Court in *Airey*’s case however established that obligation on the part of the State to provide as the assistance of a lawyer may be implied when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory or by reason of the complexity of the procedure of the matter and the applicant is unable to meet the costs of hiring a lawyer.⁹¹⁷ In other words, the right to legal aid will be implied where the applicant cannot effectively present his or her own case before the court without the assistance of a lawyer.

⁹¹⁶ Supra para 26.

⁹¹⁷ See *Airey v. Ireland*, supra paras 24-27.

The African Charter however also does not provide for the right to be assisted by an interpreter (especially in a continent where the majority of the people do not speak the official language of the court and also lack formal education) as found in other human rights treaties, which may be vital to effective participation in court proceedings.

Apart from the problem of legal aid for indigent persons, legal fees, such as filing fees, security for costs and related court fees may prove to be an uphill battle for prospective litigants in civil proceedings and thus constrain the right of access to a court. In realization of the possible negative effect of court fees on access to court, the Human Rights Committee has held that if administrative, prosecutorial or judicial authorities of a State Party laid such a cost burden on an individual by the imposition of fees such that his access to court *de facto* would be prevented, it would be violative of the right of access under Article 14(1) of the ICCPR.⁹¹⁸ The European Court has equally held the imposition of excessive court fees on an applicant before exercising his right of access to court to constitute a breach of that right under Article 6(1) of the ECHR;⁹¹⁹ according to the Court, there must be a 'proper balance' between the State interest in collecting court fees and the applicants' interest in vindicating their claims through the courts.

However, the assessment of whether the deposit of security raises an unacceptable barrier to a person's access to court according to the Supreme Court of the Netherlands will depend on the total sum required as security.⁹²⁰ Thus, an order by a senior investigating judge of a tribunal, requiring the payment of the sum of 80,000 French francs (FRF) as security for costs in respect of a civil-party application against two gendarmes, failing which the application was declared inadmissible was held by the European Court to deprive the applicant of the right of access to a court.⁹²¹

In connection with the attempted repeal by the Lord Chancellor of a law under which persons receiving income support were not obliged to pay court fees and through subsequent legislation stipulated fees to be paid for all categories of prospective litigants which did not exempt those receiving income support, the new legislation was held by the Queen's Bench Division of the United Kingdom *ultra vires* and as having the effect of inhibiting access to court for a lot of people.⁹²²

3.4.2.2.4 Right to obtain a determination of the dispute

The case law of the European Court among others, has established that the right of access to a court does not only include the right to institute proceedings, but also the right to obtain a determination of a dispute by a court. The European Court reasoned for

⁹¹⁸ See Communication No. 646/1995, *Lindon v. Australia*, para. 6.4.

⁹¹⁹ See *Kreuz v. Poland*, Judgment of 19 June 2001 para 66.

⁹²⁰ See Decision of the Supreme Court of Netherlands, 31 January 1995, case No. 237-94 t/m 252 -94 (1996) Bulletin on Constitutional Case Law 60 cited by Nihal Jayawickrama (2002), *The Judicial Application of Human Rights Law: National Regional and International Jurisprudence*, Cambridge University Press, p. 483.

⁹²¹ See *Ait-Mouhoub v. France*, European Court, Judgment of 28 October 1998 para 58

⁹²² See the United Kingdom's judgment of the Queen's Bench Division in *R v. Lord Chancellor, ex parte Witham*, [1998] QB 575.

instance, that this right would be illusory if a contracting State's domestic legal system allowed an individual to bring a civil action before a court without securing that the case would be determined by a final decision in the judicial proceedings.⁹²³

In accordance with the decision of the European Court, an applicant is therefore entitled to obtain a determination of his or her dispute by a competent court.⁹²⁴ Thus, access to court is also rendered illusory where applicants had the possibility of bringing legal proceedings but were prevented from pursuing their claims by operation of the law. To that effect, the European Court in *Kutić v. Croatia*⁹²⁵ and *Multiplex v. Croatia*⁹²⁶ held that the inability to have civil claims determined by a court for a long period as a consequence of a legislative measure which stayed the proceedings amounted to a violation of the right of access (Article 6(1)).

In criminal cases, the right of access equally implies that the final decision of a charge is made by a court within Article 6(1) of the ECHR as indicated by the decision of the European Court. Under Article 6(1) of the ECHR, the right of an appeal has been held not to be implied, but the European Court has held that where the law provides for this and the right has been exercised, the appellate court must make a determination.⁹²⁷ Where the remedy of right of appeal is provided by law it may not be limited in its essence or in a disproportionate way.⁹²⁸

The Human Rights Committee (the Committee) in General Comment No. 32,⁹²⁹ adopted a restrictive interpretation of Article 14(1) of the ICCPR, by saying that the right of equal access to a court protected in that Article relates to access in first instance procedures.⁹³⁰ The African Commission however interpreted that the right of access to a court protected by Article 7(1)(a) of the African Charter to be inclusive of the right of access to court in the first instance and the right to appeal to a higher court.⁹³¹

⁹²³ See *Hornsby v. Greece*, Judgment of 19 March 1997, Reports of Judgments and Decisions 1997-II, p. 510, para 40.

⁹²⁴ See *Multiplex v. Croatia*, Judgment of 10 July 2003.

⁹²⁵ Case no. 48778/99, ECHR 2002-II.

⁹²⁶ *Supra* at para 55.

⁹²⁷ See Pieter van Dijk et al. (2006), op. cit. pp. 563-564.

⁹²⁸ See *Poitrimol v. France*, Judgment of 23 November 1993 paras 35-38 cited by Pieter van Dijk et al. (2006), op. cit. p. 565.

⁹²⁹ This replaced general comment No. 13 on Article 14 of the ICCPR - equality before the courts and the right to a fair and public hearing by an independent court established by law.

⁹³⁰ See General Comment No. 32 para 12.

⁹³¹ See *The Constitutional Rights Project (Zamani Lekwot and 6 others) v. Nigeria*, Communication No. 87/93, ACHR/LR/A1 para 11, in that case, the Commission held that to foreclose any avenue of appeal to "competent national organs" in criminal cases bearing such penalties clearly violates Article 7(1)(a) of the African Charter and increases the risk that even severe violations may go unredressed. The victims in that case were tried and sentenced to death under the Civil Disturbances (Special Tribunal) Act, Nigerian Civil Disturbances (Special Tribunal) Act, which outs the jurisdiction of court in respect of acts done under that decree.

3.4.2.2.5 The right to a tribunal or court

The right of access to a court requires that the determination must be made by an independent and impartial court or tribunal with the required jurisdiction; otherwise an individual's right of access will be regarded as violated. This was held by the European Court in *Le Compte, Van Leuven and De Meyere v. Belgium*⁹³², and that such tribunal or court must be established by law.⁹³³

The European Court held further in the above case that for the determination of civil rights and obligations by a "tribunal" to satisfy the requirement of Article 6(1), it is required that the "tribunal" in question have jurisdiction to examine all questions of fact and law relevant to the determination of the dispute before it.⁹³⁴ In respect of appellate courts, the European Court also held that such powers shall include the power to quash in all respects, questions of fact and law, and of the decision of the body below it.⁹³⁵

Also, going by the European Court's case of *Sramek v. Austria*,⁹³⁶ a situation where the supposed judicial or quasi-judicial organ or body was not empowered to determine a dispute but only gives or tenders an advice which has no binding force, such a body will not qualify as a tribunal within Article 6(1), since the power to make a decision is inherent in the very notion of "tribunal" within the meaning of the ECHR. The inability of an administrative body to possess the power of decision-making which is binding is thus fatal to its qualification as a tribunal.

In the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, published in 2002.⁹³⁷ Guideline 13 is on the right of equal access to justice and on the scope of equal access to justice; it emphasizes the equal right of all persons before the courts and tribunals and to enjoy certain procedural guarantees in civil and criminal trials. Equality before the courts is interpreted to mean that all persons must be granted, without discrimination, a right of equal access to an independent and impartial court or tribunal for the determination of civil disputes or criminal charges.⁹³⁸

However, it has been held that where the decision taken by administrative authorities in relation to disputes concerning civil rights in respect of which there has been only a limited or no effective review exercised by the courts, such will constitute a breach of the right of access to a court.⁹³⁹ An example of this is the situation where the court is

⁹³² Judgment of 18 October 1982.

⁹³³ Ibid at para 15.

⁹³⁴ See *Le Compte, Van Leuven and De Meyere v. Belgium* (supra), para 51 under (b); see also *Terra Woningen B.V. v. the Netherlands* Judgment of 17 December 1996 p. 2123, para 54.

⁹³⁵ See *Schmautzer v. Austria* Judgment of 23 October 1995 para 36.

⁹³⁶ Judgment of 22 October 1984, Series A no. 84, p. 17, para. 36. See also *Bentham v. The Netherlands*, Judgment of 23 October 1985 para 40.

⁹³⁷ See Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies, Guideline 13 para 192 Prepared Professors Paul Hunt, Manfred Nowak and Siddiq Osmani and published in 2002 <<http://www.unhchr.ch/development/povertyfinal.html#guid13>> accessed 12 August 2007.

⁹³⁸ Ibid at para 194.

⁹³⁹ See *Obermeier v. Austria*, judgment of 28 June 1990 para 70.

bound by administrative authorities' findings and cannot inquire into the decisions of the administrative authorities once they are in conformity with the requirements of the law as laid down, and not whether there are facts which justify the decisions reached.⁹⁴⁰

Although all the provisions on the right of access to courts emphasize hearing by independent and impartial courts or tribunals in the determination of rights and obligations, and of any criminal charge against any person, the remedies often provided by competent public authorities, which are not necessarily courts of law but are saddled with dispute resolution duties may therefore not be automatically excluded. These include administrative or legislative agencies that perform quasi-judicial functions, without necessarily being independent.⁹⁴¹

This is reflected in the provision of Article 2(3)(b) of the ICCPR which regards competent administrative or legislative authorities or any other competent authority as may be provided for by the legal system of the State, for the determination of rights and obligations. It has therefore been argued that the important issue here is that those bodies should be able to provide fair and impartial justice and their remedies be effective, comparative to those provided by regular judicial bodies.⁹⁴² By extension, forms of alternative justice through alternative dispute resolution (ADR) can be said to be included in the term 'justice', especially if their design and operation guarantee equal access and provide high quality justice, which satisfies the requirements of accessibility and effectiveness.⁹⁴³

Also, in the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, Guideline 13 on the right of equal access to justice, provides that if poor people are victims of a human rights violation by State or non-State actors, they should be granted equal access to civil, administrative or constitutional courts, tribunals and other dispute resolution mechanisms free of charge as a remedy and an effective means of reparation.⁹⁴⁴

Equally connected to the above is that, for there to be an effective right of access to a court or tribunal, according to the European Court, the final judgment concerning legal issues relevant for the determination of the civil rights and obligations of an individual must rest with the court.⁹⁴⁵ Thus, the European Court held that a court or tribunal cannot have a practice which in accordance with its own case law, has to rely entirely on the opinion of a representative of the executive which is decisive for the outcome of the legal proceedings, for a solution to the problem before it.⁹⁴⁶

⁹⁴⁰ Ibid at para 69.

⁹⁴¹ See Francesco Francioni, "The Right of Access to Justice under Customary International Law", in Francesco Francioni (ed.) (2007), op. cit. p. 4.

⁹⁴² Ibid.

⁹⁴³ Ibid at p. 5.

⁹⁴⁴ Ibid at para 197.

⁹⁴⁵ *Chevron v. France*, Judgment of 13 February 2003 para 8.

⁹⁴⁶ Ibid at para 82.

Having an effective right of access to court also entails the applicant having access to a copy of the judgment.⁹⁴⁷

3.4.2.3 Right to have the judgment enforced

The right of access also encompasses the implementation of a judicial decision. Thus, the European Court in *Hornsby v. Greece*,⁹⁴⁸ where the Greek authorities refrained for more than five years from complying with a final and enforceable judicial decision, held that this constituted a breach of the right of access to court (Article 6(1)). This includes cases where private parties refuse to execute a judgment.⁹⁴⁹ The European Court conceives the implementation of judgment as vital to the operation of the rule of law and that in States that accept the rule of law, judgment cannot remain inoperative to the detriment of one party.⁹⁵⁰ According to the European Court, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed.⁹⁵¹

Furthermore, the European Court held that where there is a provision by law which enables a law officer to apply to court and have a final and enforceable judgment of a court quashed on the ground that the court could not entertain such an action or that the judicial authority exceeded its jurisdiction, it has been held to impair the very substance of the right of access to a court embodied in Article 6(1) of the ECHR.⁹⁵² The Court held further that such power of the law officer was also held to infringe the principle of legal certainty.⁹⁵³

The Constitutional Court of Spain has also held that a key element of the right to effective enforcement of a judgment is that a judgment should be respected and, if necessary, vigorously applied in the event of any obstruction by a third party.⁹⁵⁴

⁹⁴⁷ See Pieter van Dijk et al. (2006), op. cit. p. 563.

⁹⁴⁸ Supra at para 45.

⁹⁴⁹ See The European Court judgment in *Pini and Others v. Romania*, Judgment of 22 June 2004 which involved failure to execute final decisions relating to adoption.

⁹⁵⁰ See *Hornsby v. Greece*, (supra) pp. 510-511, para 40.

⁹⁵¹ See *Pini and Others v. Romania*, (supra) para 176.

⁹⁵² See The European Court judgments in *Vasilescu v. Romania*, Judgment of 22 May 1998 and *Brumărescu v. Romania*, Judgment of 28 October 1999. By Article 3.30 of the Romanian Code of Civil Procedure, as amended by Law no. 59/1993, the Procurator-General of Romania either of his own motion or on an application by the Minister of Justice, can apply to the Supreme Court of Justice to quash any final judicial decision on the grounds among others that the court exceeded its jurisdiction.

⁹⁵³ Ibid.

⁹⁵⁴ See Constitutional Court of Spain, 18/1997, 10 February 1997 Boletín Oficial Estado no. 63 of 14.03.97, 3-13 (1997) 1 Bulletin on Constitutional Case Law 96 cited by Nihal Jayawickrama (2002), op. cit. p. 493.

3.4.3 Limitations on the right of access

Like all other human rights, the right of access to court is not an absolute one, although the right of access has been described by the Queen's Bench Division of the United Kingdom as one which is near absolute.⁹⁵⁵ In *Golder v. United Kingdom*,⁹⁵⁶ the European Court affirmed that "the 'right to a court' is not absolute. According to the Court, it may be subject to limitations permitted by implication because the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals". The Court however held that such limitations or restrictions must however not restrict or reduce the access left to the individual under Article 6(1) in such a way or to such an extent that the very essence of the right is impaired.⁹⁵⁷ The Court held further in that case that while the State enjoys a certain margin of appreciation in the means to be used in securing the right of access to a court, the court is to ensure that such means are in conformity with the rights protected.

Some of these limitations may be categorized as follows:

3.4.3.1 Limitations imposed by laws, rules and practice of court

In the interests of fair administration of justice, rules and regulations may impose procedural bars preventing or limiting the possibilities of bringing potential claims to court, such as the requirement to pay fees in connection with claims, procedural limitations as to time limits and cases where the prospective litigant must obtain prior authorization before being allowed to proceed with his or her claim.⁹⁵⁸ Limitations may also relate to the conditions of admissibility of an appeal or where the interests of justice require that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, rules requiring leave before appeal,⁹⁵⁹ various limitations, including financial ones, may be placed on the individual's access to a court or tribunal.⁹⁶⁰

The European Court has stated that limitations must pursue legitimate aims, such as good administration of justice, preventing courts from being overloaded, proper functioning of the judiciary, good international relations which may require the grant of

⁹⁵⁵ The Queen's Bench Division of the United Kingdom has described the right to access to a court 'as near [an] absolute right as any which can be envisaged'. See *R v. Lord Chancellor, ex parte Witham* (1997) 3 LRC 349 cited by Nihal Jayawickrama (2002), op. cit. p. 482.

⁹⁵⁶ Supra at para 38.

⁹⁵⁷ See *Philis v. Greece*, Judgment of 27 August 1991, Series A no. 209, p. 20, para. 59. See also *Kreuz v. Poland*, Judgment of 19 June 2001 para 54.

⁹⁵⁸ See *Ashingdane v. the United Kingdom*, (supra) para 59.

⁹⁵⁹ It has been held that a rule which requires an accused to apply for and obtain leave before pursuing an appeal does not infringe his right of access to a court, particularly where if leave is refused, a petition procedure allows the accused to approach a higher court for a reassessment of the issue. See *State v. Rems*, Constitutional Court of South Africa (1996) 2 LRC 164 cited by Nihal Jayawickrama (2002), op. cit. p. 483.

⁹⁶⁰ See *Brualla Gomez de la Torre v. Spain*, Judgment of 19 December 1997 para 33; *Kreuz v. Poland*, (supra) para 54.

immunity, etc. The Court held further that there must also be a reasonable relationship of proportionality between the means employed (i.e. the limitations) and the aim sought to be achieved.⁹⁶¹ If these requirements are not met, any limitation imposed on the right of access will be declared as impairing the very essence of a person's right of access to a court, thus constituting a violation of the right of access embodied in Article 6(1) of the ECHR.⁹⁶²

In spite of the several important purposes of limitation laws or procedural limitations regulating the period within which an individual can commence an action or concerning proceedings, the European Court held that this will constitute a violation on the right of access to a court if it is unduly short.⁹⁶³ Also, a requirement that a person convicted by a lower court who is still in prison has to obtain a judge's certificate before being allowed to pursue an appeal to a higher court, was held by the Constitutional Court of South Africa as operating to restrict that person's full access to appeal to a court.⁹⁶⁴

Limitations may also be imposed on access to court for a category of people which will not be incompatible with the right of access, such as minors, bankrupts, etc. or restrictions imposed on vexatious litigants, since they are aimed at ensuring effectiveness of the system.⁹⁶⁵ The right of access may be restricted in criminal proceedings, with a decision whether to prosecute or discontinue the proceedings by *nolle prosequi*. Where the authorities decide to prosecute, the accused has the right to a determination of the case.⁹⁶⁶

The provision of the law to the effect that no civil proceedings may be instituted against the government without the prior consent of the Attorney-General was declared by the Supreme Court of Tanzania as violating the right to unimpeded access to court in order to have one's grievances heard and determined.⁹⁶⁷ A provision in a Labour Code which stipulated that certain categories of civil servants were to have their labour disputes settled by their superiors and not by the court was held by the Constitutional Court of Georgia to prevent them from exercising their right of access to court.⁹⁶⁸

⁹⁶¹ See *Ashingdane v. The United Kingdom*, Judgment of 28 May 1995 para 57; *Levages Prestations Services v. France* Judgment of 23 October 1996, Reports 1996-V, p. 1543, para 40; *Brualla Gomez de la Torre v. Spain*, Judgment of 19 December 1997 para 33.

⁹⁶² Ibid.

⁹⁶³ See *Stubbings and Others v. the United Kingdom*, Judgment of 22 October 1996 paras 53 -56.

⁹⁶⁴ See *State v. Ntuli*, Constitutional Court of South Africa, (1996) 2 LRC 151 cited by Nihal Jayawickrama (2002), op. cit. p. 483.

⁹⁶⁵ See D.J. Harris, M. O'Boyle and C. Warbrick (1995), *Law of the European Convention on Human Rights*, Butterworths, pp. 199-200.

⁹⁶⁶ See D.J. Harris, M. O'Boyle and C. Warbrick (1995), op. cit. p. 201.

⁹⁶⁷ See *Pumbun et al. v. Attorney-General*, Supreme Court of Tanzania (1993) 2 LRC 317 cited by Nihal Jayawickrama (2002), op. cit. p. 485. See also, *Government of Imo State v. Greeco Construction & Engineering Associates Limited*, Court of Appeal Nigeria, [1985] 3 N.W.L.R. (Pt.11) p. 71 where the Petition of rights law, which requires the fiat of the Attorney-General to be obtained before any civil action is instituted against the government of a State, was struck out as inconsistent with the provisions of section 33(1)) of the then 1979 Constitution on right to fair hearing.

⁹⁶⁸ See Decision of the Constitutional Court of Georgia, 2/3-13, 5 December, 1996 (1996) 3 Bulletin on Constitutional Case Law 354 cited by Nihal Jayawickrama (2002), op. cit. p. 485.

An indemnity law purporting to deem legal and constitutional, previously performed illegal acts and prohibiting an aggrieved person from taking any action before any court to determine the legality or otherwise of such act, was declared by the Court of Appeal of Grenada not to be compatible with the right of access to a court.⁹⁶⁹ A distinction has been drawn between the act of a State covering up its own crimes and granting itself immunity, and the decision of a State in transition from long periods of authoritarian and abusive rule, taken with a view to assist such transition. In the latter, amnesty was held by the Constitutional Court of South Africa not to operate to grant immunity to wrongdoers without the victims or their relatives having the compensatory benefits of discovering the truth, since it was specifically provided that amnesty would be granted only where there was full disclosure of the relevant facts.⁹⁷⁰

Equally deemed as a clog in the exercise of the right of access to court is with respect to pre-action notice, by which the law creating some government agencies, institutions and parastatals require that statutory notice be given to such bodies before action can be instituted against them. Although such law was upheld by the Supreme Court of Nigeria in *Fawehinmi Construction Co. Ltd. v. University of Ife*,⁹⁷¹ a High Court sitting in Ogun State Nigeria, in *Babarinde v Ogun State University*,⁹⁷² declined to uphold pre-action notice and held that the issue of pre-action notice would appear to be a clog in the wheel of the exercise of fundamental human rights and consequently of access to court.

Another possible constraint on the right of access to a court has been identified as the practice of awarding costs to a winning party, which the Human Rights Committee said might have a deterrent effect on the ability of individuals to redress a violation of their rights.⁹⁷³

At common law and even non-common law jurisdictions, the right of access to court is accorded a prime position and the case law has established a preference for construing narrowly laws seeking to restrict access to courts.⁹⁷⁴

⁹⁶⁹ See *Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds*, Court of Appeal of Grenada and the West Indies Associated States, (1977) 24 WIR 552 cited by Nihal Jayawickrama (2002), op. cit. p. 491.

⁹⁷⁰ The Constitutional Court of South Africa observed that granting amnesty was essential in order to encourage those responsible for acts which would ordinarily be categorized as invasions of human rights to admit fully their actions without fear of punishment or substantial civil claims for damages. See *AZAPO v. President of South Africa*, Constitutional Court of South Africa, (1997) 4 IRC 40 cited by Nihal Jayawickrama (2002), op. cit. p. 491.

⁹⁷¹ [1986] 6 N.W.L.R. (Pt.553) p. 35.

⁹⁷² [2001] 1 C.H.R. p. 156.

⁹⁷³ See General Comment No. 32 para 11. See Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.2.

⁹⁷⁴ See Mark Elliot (2001), *The Constitutional Foundations of Judicial Review*, Hart Publishing, pp. 213-214, where the author cited these UK cases, *Anisminic Ltd. v. Foreign Compensation* [1969] 2 AC 147; *R v. Secretary of State for the Home Secretary ex parte Fayed*, [1998] 1 WLR 763.

3.4.3.2 Waiver

Despite the guarantee by law and judicial protection of the right of access to a court, this right may be circumscribed by reason of a waiver of it. Waiver may take place in respect of the right of access in both civil and criminal cases.⁹⁷⁵ Waiver may relate to the right of access or some elements of this right, but in order for a waiver to operate as a restriction on the right of access to a court by an individual, it must result from unequivocal statements or documents.⁹⁷⁶ In *Le Compte, Van Leuven and De Meyere*,⁹⁷⁷ the European Court held that the applicants had not waived their right to have proceedings conducted in public, since the purported waiver of this right was not manifestly clear.

A waiver may also occur as a consequence of a contract clause where the parties agree to submit to arbitration in the event of a dispute.⁹⁷⁸ A compulsory system of arbitration has been declared by the Constitutional Court of Spain to be incompatible with the right of access to a court or where the exercise of the fundamental right of access to court was made conditional upon the agreement or consent of the other party being obtained.⁹⁷⁹

3.4.3.3 Decline of jurisdiction by court

The court may limit the right of access to a court by declining to exercise its jurisdiction to determine the issue brought before it. This may be based among others on the issues of *locus standi*,⁹⁸⁰ jurisdiction and other doctrines, such as doctrine of *forum non conveniens*, which is applicable mostly in common law jurisdictions. The doctrine permits a court to decline to exercise jurisdiction to hear a matter on the grounds that it is not a suitable or proper forum and that a more convenient or alternative forum exists.

3.4.3.4 Limitation on ground of immunity

Right of access to a court may further be limited on grounds of immunity⁹⁸¹ accorded to sovereign States, certain individuals and some international organizations, which are immune from local jurisdiction. Legal writs can therefore not be properly issued on them by courts or tribunals in whatever local jurisdiction they are. The immunity accorded certain officials of sovereign States is based on the fact that the State cannot be subjected to the local jurisdiction of another State. In respect of international organizations, it was believed that they could be susceptible to manipulation by the host

⁹⁷⁵ See Nihal Jayawickrama (2002), op. cit. p. 485.

⁹⁷⁶ See *Neumeister v. Austria*, Judgment of 7 May 1974 para 36.

⁹⁷⁷ Judgment of 23 June 1981 para 61.

⁹⁷⁸ See Nihal Jayawickrama (2002), op. cit. p. 485.

⁹⁷⁹ See Decision of the Constitutional Court of Spain, 23 November 1995 Case No. 174/1995, Boletín oficial del Estado, no. 310 of 28 December 1995, 38-44, (1995) 3 Bulletin on Constitutional Case Law 373 cited by Nihal Jayawickrama (2002), op. cit. p. 490.

⁹⁸⁰ See Paragraph 3.2.4 of this work.

⁹⁸¹ See *Fayed v. the United Kingdom*, European Court judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, para 65.

government or that their operations may be impaired if they are subjected to local jurisdiction and their impartiality consequently affected.⁹⁸²

A distinction is however drawn between acts that are *jure imperi*, for which there is total immunity from legal process and those that are *jure gestionis*, for which States do not claim immunity. The latter touches on commercial transactions by organizations owned or controlled by the State.⁹⁸³ The basis of a claim of immunity may be parliamentary, diplomatic⁹⁸⁴ or State immunity.⁹⁸⁵ The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine a claim.⁹⁸⁶ Defence of immunity is construed by the court narrowly⁹⁸⁷ and acts purportedly claimed as subject to immunity must be within the purview of the immunity granted.⁹⁸⁸

3.4.3.5 Derogation on grounds of emergency and security

The right of access to a court may be derogated from for emergency or security reasons, although situations of limitations of rights are quite distinct from derogation cases. Human rights treaties contain provisions permitting derogation of rights during wars, public danger or emergency threatening the independence or security of a country.⁹⁸⁹ Most of the human rights treaties however provide for certain rights that cannot be derogated from during emergency or other periods.⁹⁹⁰ The African Charter does not

⁹⁸² See Gamal Moursi Badr (1984), *State Immunity: An Analytical and Prognostic View*, Martinus Nijhoff Publishers, pp. 94 – 96.

⁹⁸³ Ibid.

⁹⁸⁴ For diplomatic immunity, see Decision of the Constitutional Court of Spain, 29 August 1995, Case No. 140/1995, Boletín Oficial del Estado, no. 246, of 14 October 1995, 51-63, (1995) 3 Bulletin on Constitutional Case Law 368-170 cited by Nihal Jayawickrama (2002), op. cit. p. 485.

⁹⁸⁵ See D.J. Harris, M. O'Boyle and C. Warbrick (1995), op. cit. p. 200.

⁹⁸⁶ See *Al-Adsani v. the United Kingdom*, Judgment of 21 November 2001 para 48.

⁹⁸⁷ In *Osman v. The United Kingdom*,⁹⁸⁷ the European Court held that the exclusionary rule developed by the House of Lords,⁹⁸⁷ which granted immunity to the police from civil suits for their acts or omissions in the context of the investigation and suppression of crime, without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police and therefore constitutes a disproportionate restriction on the right of access to a court. The House of Lords' decision was in *Hill v. Chief Constable of West Yorkshire Police*, [1989] AC 53, where the House of Lords held that, on grounds of public policy, no action would lie against the police for negligence in the investigation and suppression of crime.

⁹⁸⁸ ⁹⁸⁸ See Pieter van Dijk et al. (2006), op. cit. p. 571.

⁹⁸⁹ See Article 4 of the ICCPR, Article 15 of the European Convention, Article 27 of the American Convention.

⁹⁹⁰ Under Article 4 of the ICCPR, rights that cannot be derogated from are: the right to life (Article 6), freedom from torture (Article 7), slavery or to be held in servitude (Article 8), imprisonment on ground of inability to fulfil a contractual obligation (Article 11), right to freedom from *ex post facto* laws (Article 16), right to recognition before the law (Article 16) and right to freedom of thought, conscience and religion (Article 18). Under Article 15 of the European Convention, the following rights cannot be derogated from: the right to life (Article 2), freedom from torture (Article 3), slavery or servitude (Article 4) and imprisonment without law (Article 7). Under Article 27 of the American Convention, the following rights cannot be derogated from: the right to juridical personality (Article 3), right to life (Article 4), right to humane treatment (Article 5), freedom from slavery (Article 6), freedom from *ex post facto* laws (Article 9), freedom of conscience and religion (Article 12), rights of

have a non-derogation clause. While the right of access to court is not specifically included in any of the human rights treaties in the list of non-derogable rights, it is important to state that the American Convention can be said to have accorded the right to access justice the status of a non-derogable right. This is based on the fact that in Article 27(2) containing the list of such high class rights includes, ‘the judicial guarantees essential for the protection of such rights’, which in essence is the right of access to a court, as this is the only means of accessing judicial protection.

It must be added that notwithstanding the failure of human rights treaties to specifically prioritize the right of access to a court by making it non-derogable, in view of its importance, it can be safely stated that this right is not inferior to the non-derogable rights. After all, what is the use of such high profile rights if the right serving as a means of their protection is itself less guaranteed? It was not surprising therefore, that the Human Rights Committee (the Committee) in its General Comment 29 on Article 4 (derogations during a state of emergency)⁹⁹¹ stated that in spite of the fact that the provision of Article 2(3) of the ICCPR which requires State Parties to provide remedies for any violation of the Covenant is not contained in the list of non-derogable provisions in Article 4(2), it constitutes a treaty obligation inherent in the Covenant as a whole.⁹⁹² It added that State Parties are obliged to comply with the fundamental obligation under the said Article 2(3) to provide a remedy that is effective during a state of emergency.

In derogation cases however, there is a caveat that measures adopted must not be inconsistent with the States’ obligations under international law and must not involve discrimination on the ground of race, colour, sex, language, religion or social origin. Thus derogation may be justified as may be required by the exigencies of the time, provided that the measures adopted are reasonable and the aim legitimate. It is to be noted that right of effective access to a court has been held to be indispensable, not only in normal times, but also during periods of emergency threatening the life of a nation.⁹⁹³

Right of access to a court may equally be restricted on the ground of security considerations, such that a law restricting access to court for security reasons may not be wholly incompatible with that right, provided public interest considerations can be balanced with the restriction on individual rights.⁹⁹⁴

the family (Article 12), right to a name (Article 18), rights of the child (Article 19), right to nationality (Article 20), right to participate in government (Article 23) and the judicial guarantees essential for the protection of such rights.

⁹⁹¹ See General Comment No. 29 States of Emergency (Article 4) CCPR/C/21/Rev.1/Add.11 of 31 August 2001 para 14.

⁹⁹² Ibid.

⁹⁹³ See *Abiola v. Abacha & Others (No. 1)*,⁹⁹³ the Federal High Court of Nigeria, [1 NPILR] p. 109 at p. 117 para 7.

⁹⁹⁴ See European Court case of *Klass and Others v. Germany*, Judgment of 6 September 1978 para 75.

3.5 Access to justice movement

The problem of inaccessibility of the poor and the disadvantaged groups to justice has led to various agitations around the world since the 1960s, with reformers pushing for changes in the justice systems at the national plane, championed by the Access to Justice Movement Worldwide,⁹⁹⁵ in a bid to provide a fair and efficient justice system and also improve access to justice for the poor, in order to empower them to be able to assert their rights.

The Worldwide Movement on Access to Justice, having Mauro Cappelletti as one of the front liners has carried out several projects⁹⁹⁶ which have examined the various ways to make rights effective in different parts of the world.⁹⁹⁷ The Movement gave prominence to the concept of access to justice and elicited general interest worldwide, resulting in access to justice conferences and influencing the structuring of the machinery of justice to facilitate access to justice for the poor and disadvantaged groups.⁹⁹⁸

A comparative study by the Movement indicated that a plurality of machineries and reforms have been settled as having the potential to facilitate access to justice for the underprivileged. Key among these are court reforms, reforms in court procedures and in the legal profession in order to adapt the justice system to new social policies and newly recognized interests.⁹⁹⁹ Also recognized as a means of improving access to justice are court fee waivers and the provision of legal aid for the poor. However, an important factor which has been recognized as vital to the success of these devices and reforms is that of 'sustained political commitment to in fact accomplish change'.¹⁰⁰⁰

⁹⁹⁵ Available at

<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20745998~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062,00.html#access>>
accessed 5 November 2008.

⁹⁹⁶ These include, Cappelletti, Garth and Trocker (1981), *Access to Justice, Comparative General Report*: Rabales Z 40; Cappelletti M. (ed.) (1981), *Access to Justice and the Welfare State*, Alphen aan den Rijn Sijthoff; Cappelletti, Mauro. (gen. ed.) (1978-79), *Access to Justice* (in four volumes.). Milan: Dott. A. Giuffrè; Alphen aan den Rijn: Sijthoff and Noordhoff.

⁹⁹⁷ See Cappelletti and Garth, "Access to Justice, The Worldwide Movement to Make Rights Effective: A General Report", in M. Cappelletti and B. Garth (eds.) (1978), *Access to Justice: A World Survey 3*, Alphen aan den Rijn/Milan, Sijthoff and Noordhoff/Guiffre, Vol. I of the Florence Access to Justice Series, pp. 59-66; Kojima and Taniguchi, "Access to Justice in Japan", in M. Cappelletti and B. Garth (eds.) (1978), *Access to Justice: A World Survey 3*, Alphen aan den Rijn/Milan, Sijthoff and Noordhoff/Guiffre, Vol. I of the Florence Access to Justice Series, Johnson, "Thinking about Access: A preliminary Typology of Possible Strategies", in M. Cappelletti and B. Garth (eds.) (1979), *Access to Justice: Emerging Issues and Perspectives 3*, Alphen aan den Rijn/Milan.

⁹⁹⁸ Some of the conferences that were held on access to justice include, Access to Justice in Israel, at Bar-Ilan University in May 1981, Ministers of Justice of French-speaking countries also held a conference on 'L'accès à la justice in September 1980 in Paris, France. See Mauro Cappelletti, Bryant Garth and Nicolo Trocher Florence, Bloomington, Ind., and Siena, *Access to Justice Variations and Continuity of a World-wide Movement*, 54 Rev. Jur. U.P.R. 221 1985 p. 222.

⁹⁹⁹ See Mauro Cappelletti, Bryant Garth et al., op. cit. p. 222.

¹⁰⁰⁰ Ibid at p. 225.

In one of their prominent publications that beamed its searchlight on efforts at facilitating effective access to justice around the globe, the Movement identified the first three waves of reform then making the rounds. The first wave hinged on efforts to provide legal services for the poor, and the second phase was about the promotion of representative actions and other procedural liberalization (e.g. liberalization of the rules of standing) such that large amount of claims can be resolved in a single action.

The third wave relates to a broader conception of access to justice,¹⁰⁰¹ which dwelled on reforms having to do with justice institutions themselves, e.g. reforms in the way the courts function, the need to relate and adapt the civil procedure to the type of dispute-such as the development of small claims courts and non-judicial alternatives – ADR - which was aimed at reducing court congestion, modifications in the legal profession to make lawyers and non-lawyer advocates more accessible and effective in enforcing the new rights of the ordinary people.¹⁰⁰² Modification in the legal profession also consisted of liberalizing professional rules aimed at permitting lawyers to advertise, i.e. allowing solicitation in the public interest.¹⁰⁰³ This modification is based on the findings that people with problems having legal dimension hardly ever consult a lawyer.¹⁰⁰⁴

The Movement noted that in civil procedure, experiments are being conducted with more expeditious proceedings, accessibility of justice and the administration of justice having regard to the costs involved. Concerns were however raised about the cost implications of necessary reforms – cost of building new courts, appointment of more judges, appointment of paralegal personnel which will be saddled with the task of making individuals aware of their new rights and the costs of enforcement machinery.¹⁰⁰⁵ Notwithstanding the real issue of costs, it was pointed out that enforcement is vital to make rights more than merely symbolic.¹⁰⁰⁶

The above clearly points out the access to justice problems confronting the poor and disadvantage groups, and efforts of the global Movement in pushing for reforms in other to make rights entrenched in the law realizable. It was recognized by the Movement that mere provisions in the law do not solve problems or make rights effective by virtue of being in the statutes - a situation which has informed the demand for better and more efficient enforcement mechanisms.¹⁰⁰⁷ The aim of access to justice therefore has been stated as that of a push towards the fulfilment of the promises embodied in legislation and that of overcoming structural and practical barriers to enforcement of laws on behalf of the ‘have nots’.¹⁰⁰⁸

¹⁰⁰¹ See Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, op. cit. p. 222.

¹⁰⁰² See Mauro Cappelletti, Bryant Garth et al., op. cit. p. 241.

¹⁰⁰³ *In re Primus*, 436 U.S. 412 (1978) cited in See Mauro Cappelletti, Bryant Garth et al., op. cit. p. 255.

¹⁰⁰⁴ See Mauro Cappelletti, Bryant Garth et al., op. cit. p. 255.

¹⁰⁰⁵ *Ibid* at p. 266.

¹⁰⁰⁶ *Ibid*.

¹⁰⁰⁷ *Ibid* at p. 258.

¹⁰⁰⁸ *Ibid* at p. 259.

The projects on access to justice therefore focused specifically on the Movement's efforts at making some rights effective, especially as regards the rights of the poor, consumers, environmentalists, employers, tenants, etc., which were regarded as not being effectively enforced. The Movement claimed that there was a need to change the theoretical conception of access to justice such that justice will not depend on affordability like other commodities available to only those who can afford the costs.¹⁰⁰⁹ The legal system, the Movement further claims, creates barriers for isolated individuals, especially the poor whereas the "haves" are able to use the legal system to advance their interests.¹⁰¹⁰ Changes in the legal systems are therefore being sought to facilitate their enforcement in order to make the rights of the weak groups, as embodied in statutes, effective. The concern of the Access to Justice Movement does not focus only on access to justice for the weak groups or the underprivileged, but equally on the result or consequences of such access.¹⁰¹¹

Justice in this sense is conceived and geared towards the realization of the redistribution of rights which have been enacted into law by modern welfare states. On the basis of this it was felt necessary to demand reforms on behalf of the relatively weak whom those rights were expected to benefit, based on the assumption that rights that have been entrenched in the statutes are expected to be enforced. Access to justice for the underprivileged was also conceived as a means of delivering social benefits.¹⁰¹²

The awareness created of the problem of inaccessibility of justice to the poor and the disadvantaged groups by the Worldwide Movement on Access to Justice and the case law from different jurisdictions as examined above has generated concern for ensuring equal and effective right of access to justice for all. Efforts have been made at international and regional levels at providing access to justice for the ordinary people, especially the poor, especially victims of crimes and abuse of power, the poor and vulnerable groups and victims of gross violations of human rights.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN General Assembly Resolution A/RES/40/34 of 29 November 1985 provides that victims are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.¹⁰¹³

In the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, the right of equal access to justice is among other rights advocated as important to be

¹⁰⁰⁹ See Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, op. cit. p. 183.

¹⁰¹⁰ Ibid at p. 195.

¹⁰¹¹ See Mauro Cappelletti, Bryant Garth et al., p.223.

¹⁰¹² Ibid at pp. 223-4.

¹⁰¹³ See para 4 of the Declaration, under access to justice and fair treatment sub-heading.

addressed in poverty reduction strategies in the human rights approach (at the national level)- published in 2002, Guideline 13 is on the right of equal access to justice.¹⁰¹⁴

Equally, under the Basic Principles and Guidance on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly Resolution A/RES/60/147 of 16 December 2005, paragraph 3(c) imposes an obligation on the government to ensure that those who claim to be victims of a human rights or humanitarian law violation are given equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation. Also under paragraph 12 of the same Basic Principles, a victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.

In the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, under Guideline 13, it was noted that poor people are particularly vulnerable to human rights violations and abuses by governmental authorities and private individuals. It was however stressed that the most important tool for the poor to defend themselves against these abuses is through court protection, but that owing to economic or other reasons poor people lack the capability to obtain court protection.¹⁰¹⁵ Consequently, States are obliged to actively promote free access of the poor to courts, tribunals and other dispute resolution mechanisms as a remedy against human rights violations.¹⁰¹⁶

Also, under Guideline 13, it was added that in view of the fact that poor people are accused of criminal behaviour¹⁰¹⁷ more often than the non-poor, the poor have a right to enjoy minimum guarantees of a fair trial, such as the presumption of innocence irrespective of whether they have committed a crime or not. The Guideline states further that experience shows that poor people are more likely than others to be discriminated against and deprived of those minimum guarantees.¹⁰¹⁸

In criminal trials, victims of crime are also to be provided with equal access to justice with necessary specific protection as they may require.¹⁰¹⁹ The Guideline further imposes a positive obligation on governments to provide counsel free of charge to an accused in a criminal trial if he does not have sufficient means to pay for legal assistance, if the interest of justice so requires. Obligation is also imposed that if accused persons do not understand or speak the language used in court, they should

¹⁰¹⁴ See Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies, op. cit. Guideline 13 para 192 Prepared Professors Paul Hunt, Manfred Nowak and Siddiq Osmani and published in 2002 <<http://www.unhchr.ch/development/povertyfinal.html#guid13>> accessed 12 August 2007.

¹⁰¹⁵ Ibid Guideline 13 para 192.

¹⁰¹⁶ Ibid.

¹⁰¹⁷ For instance, they are the first to be rounded up as easy suspects for crimes not even committed by them. See X, "Freedom from Poverty", in Wolfgang Benedek (ed) (2006), op. cit. p. 85.

¹⁰¹⁸ See Draft Guidelines: op. cit. Guideline 13 para 193.

¹⁰¹⁹ Ibid at para 195.

have the free assistance of an interpreter.¹⁰²⁰ These obligations are in consonance with the provisions of Article 14 of the ICCPR on fair trials.

Under Guideline 13, in order to realise the right of equal access to justice for the poor, a poverty reduction strategy was required to include the government ensuring that adequate justice mechanisms are available in sufficient number, and that they are accessible to the poor and acceptable in terms of quality. Towards achieving this end, the government was given the discretion to establish innovative, non-formal dispute resolution mechanisms that are of good quality, accessible to the poor and consistent with all relevant human rights principles.¹⁰²¹

Measures designed by the Guideline to promote the poor's right of access to justice include the following:¹⁰²²

- (a) Introducing information campaigns, in slums and other areas where the poor live, on the right of access to justice;
- (b) Increasing the number of courts, tribunals and non-formal dispute resolution mechanisms;
- (c) Increasing the number of judges and law enforcement personnel, especially in poor areas;
- (d) Increasing the salary of judges and law enforcement personnel;
- (e) Establishing law clinics for the poor;
- (f) Extending legal aid programmes for the poor in both civil and criminal proceedings;
- (g) Establishing training programmes for judges, lawyers and law enforcement personnel on the right of the poor to non-discrimination;
- (h) Improving the enforcement of judgments by the relevant authorities;
- (i) Improving the poor's physical access to courts, non-formal dispute resolution mechanisms and law enforcement officers, in particular in remote rural areas;
- (j) Eliminating corruption in the administration of justice;
- (k) Helping poor victims of crime to bring offenders to justice.

¹⁰²⁰ Ibid at para 196.

¹⁰²¹ Ibid at para 198.

¹⁰²² Ibid at para 199.

Furthermore, the Committee of Ministers of the Council of Europe in 1981 adopted Recommendation No. R (81) 7 on Measures Facilitating Access to Justice, to Member States. The Recommendation impresses on Member States the need to create public awareness on the means open to individuals to assert their rights before the court and the need to make judicial proceedings generally simple, speedy and inexpensive.

In particular, the Recommendation, in order to eliminate financial barriers to accessing justice provided that no sum of money should be required on behalf of the State as a condition for commencing proceedings which would be unreasonable, having regard to the matters in issue and that where court fees constitute impediments to justice, they should if possible, be reduced or abolished.¹⁰²³

The Committee of Ministers also adopted Recommendation No. R (87) 18, Concerning the Simplification of Criminal Justice and Recommendation No. R (95) 12 on the Management of Criminal Justice.¹⁰²⁴ The Committee of Ministers further adopted Recommendation No. R (93)1 on Effective Access to the Law and to Justice for the very Poor,¹⁰²⁵ which emphasized the promotion of action to make the legal profession aware of the problem of the very poor, promotion of legal advice for the very poor and the facilitating of effective access to quasi-judicial methods of conflict resolution and access to courts for the very poor.¹⁰²⁶

The African Commission on Human and Peoples' Rights has recently drafted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa which was adopted in 2001, which aimed at facilitating access to justice.

Although the said Principles and Guidelines have no legal force, they are nonetheless intended to act as guidelines on how the right to free trial should be interpreted in Africa. Section C(b)(1) of the Principles and Guidelines - on the right to an effective remedy - provides that this right includes access to justice, while Section K(a) dealing with access to judicial services provides that States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without discrimination on grounds of property, economic or other status, among others. Section K(d) further provides that States shall ensure that such access is not impeded by situations such as distance to location of judicial institutions, lack of information about judicial systems, the imposition of unaffordable or excessive court fees or lack of assistance to understand the procedures and to complete the formalities.

In the same vein, the African Commission also adopted a resolution in Banjul, Gambia in 2006 on the Declaration on Accessing Legal Aid in Africa in the Criminal Justice

¹⁰²³ See Recommendation No. R (81) 7 on Measures Facilitating Access to Justice, (adopted on 14 May 1981 at its 68 Session) Section D paras 11 and 12.

¹⁰²⁴ Adopted by the Committee of Ministers on 11 September 1995 at the 543rd meeting of the Ministers' Deputies.

¹⁰²⁵ Adopted by the Committee of Ministers on 8 January 1993 at the 484th meeting of the Ministers' Deputies.

¹⁰²⁶ See Paras 1, 2 and 3.

System. The Commission noted in the said Declaration, the fact that lack of access to legal aid has had an adverse impact on the right of access to justice in Africa.¹⁰²⁷

The major achievements of the Access to Justice Movement consist of increased usage of ADR around the world and the high success rate of the representative action, especially in the US. In a self-appraisal however, the limitation and risks of the access to justice approach have been noted by the General Reporters of the Access to Justice Movement, to the effect that “streamlined, efficiency procedures will abandon the fundamental guarantees of the civil procedure” and that “the pressure on the legal system to reduce its burden and find still cheaper procedure” will imperil “the core values of traditional justice”.¹⁰²⁸ The latter has been interpreted to mean seeking justice that is cheap in terms of cost but not of quality.¹⁰²⁹

The Access to Justice Movement projects, have indicated that much is yet to be done with respect to enforcement of fundamental rights, and that as access to administrative and social machinery of justice is very far from being achieved.¹⁰³⁰ The scepticism that has been raised about the access to justice approach was that despite some of the remedies identified to address the access to justice problems, the legal system was likely to remain largely distant and strange to many of the people that it aimed to protect.¹⁰³¹ It can therefore be said that in spite of the achievements of the Movement, much has not been achieved with respect to the enforcement of human rights, especially for the poor.

3.6 Interests in access to justice concept outside legal circles

In appreciation of the crucial role that realization of human rights can play in poverty reduction efforts, there has been increasing interest in facilitating access to justice for the poor and disadvantaged groups around the world by development agencies and international financial institutions. The UNDP for instance, devoted its 2000 Human Development Report¹⁰³² to the importance of the human rights-based approach to development and how human rights could empower people to fight poverty. It stated in the said report that grave human rights abuses around the globe inhibit poverty reduction measures. It further emphasized access to justice by stating that without justice, human rights laws are no more than mere paper.¹⁰³³ It therefore among others, advocated legal reforms in order to facilitate peoples’ access to legal processes and that institutional barriers to such access be removed.¹⁰³⁴

¹⁰²⁷ See ACHR/Res. 100(XXXX): Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System, adopted in Banjul, Gambia on 29 November 2006 at its 40th Ordinary Session.

¹⁰²⁸ See Andre Tunc, “The Quest for Justice” in M. Cappelletti and B. Garth (eds.) (1978), op. cit. p. 352.

¹⁰²⁹ Ibid.

¹⁰³⁰ Ibid at p. 317.

¹⁰³¹ Ibid at p. 358.

¹⁰³² See Chapter 2 of this work under ‘Human development approach’.

¹⁰³³ See UNDP (2000), *Human Development Report*, p. 23.

¹⁰³⁴ Ibid at p. 26.

In 2004 and 2005, the UNDP authored two publications on access to justice, which are, 'Access to Justice Practice Note' and 'Programming Justice: Access for all, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice'. These publications are essentially based on how to facilitate access to justice for the poor and disadvantaged groups. The publications detailed how access to justice can significantly contribute to poverty reduction and increase human development.

The United Kingdom's Department for International Development (DFID) in 2000 produced a publication on 'Justice and Poverty Reduction' and in 2002 produced another one 'Safety, security and accessible justice: Putting policy into practice' which aimed at exploring ways that access to justice for the poor can assist poverty reduction and make the justice system work better, especially for poor people.

The World Bank also has different programmes/projects dealing with law and justice reforms - aimed at improving the functioning of law and justice institutions, good governance and anti-corruption, and justice for the poor, in developing and transition countries.¹⁰³⁵ The World Bank believes for instance, that effective legal frameworks and institutions are pivotal for alleviating poverty, just as it views good governance and anti-corruption as central to its poverty alleviation mission. The World Bank since the early 1990s has been supporting and funding projects on legal and judicial reforms.

Further to the above, access to justice has been regarded as crucial for poverty eradication and human development on the grounds that 'justice mechanisms can be used as tools to overcome deprivation by ensuring, for instance, access to education for girls and minorities, or by developing jurisprudence on access to food, political or other economic, cultural or social human rights'.¹⁰³⁶ The case law from India and South Africa among others, are instructive here. It has also been recognized in development that poverty and discrimination can disadvantage those seeking judicial remedies through existing institutions, thus making the UNDP to now prioritize access to justice in its programmes.¹⁰³⁷

Access to justice is seen as being much more than improving individuals' access to justice and guaranteeing legal representation. In this context, access to justice is defined in terms of empowering by combating inequalities, discrimination and ensuring accountability through the recognition of people's entitlement to remedies, and ensuring that legal and judicial outcomes are just and equitable.¹⁰³⁸

¹⁰³⁵ See The World Bank's internet pages on Law and Development, Law and Justice Institutions, Good Governance and Anti-corruption.

¹⁰³⁶ See UNDP (2005), *Programming Justice: Access for all, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, p. 3.

¹⁰³⁷ See UNDP (2005), *Programming Justice*., op. cit., p. 4; Ewa Wojkowska (2006), *Doing Justice: How informal justice Systems can contribute*, UNDP Oslo Governance Centre.

¹⁰³⁸ See UNDP (2004), *Access to Justice Practice Note*, p. 6.

3.7 Conclusion

The concept of access to justice as examined above clearly indicates the importance that is being attached to the right of access to justice as a fundamental right more than ever before, the renewed interest and increasing priority that the concept is gaining both in human rights and development circles. This phenomenon is a result of the potential of the access to justice approach to significantly contribute to poverty reduction measures and as a source of empowerment for the disadvantaged groups through rights protection.

From the perspective of protecting all human rights, the right of access to justice is regarded as a crucial right that must be guarded zealously, as reflected in the consideration of the case law from several jurisdictions and in many publications. Although some of the case law from some national jurisdictions deals with provisions on rights to fair hearing, due process and judicial protection clauses, they nonetheless emphasize the importance of the right of access to a court to have one's claims determined and that the right to a court may not be expressly formulated in some national constitutions, but that it is inherent in those provisions.

The importance of the right of access to justice has equally been recognized by some of the case law as vital not only to the enforcement of all other rights and the rule of law, but also as germane to the proper functioning of society. This might have informed the expansive interpretations given to this right in order to pull down barriers, thereby widening its scope to encompass access to legal justice, the machinery of justice, justice and the maintenance of the rule of law.

The consideration of the challenges militating against the poor in enforcing their fundamental rights in Nigeria above clearly condense to that of the problem of a lack of access to justice, the bedrock of which is purely economic.¹⁰³⁹ Justice is something that people dearly value, the poor without exception and the view of a poor farmer in Bangladesh epitomized this when he stated: "*I can tolerate poverty, but not to get justice in the eye of the law in my own country just because I am poor, that I cannot accept.*"¹⁰⁴⁰ The poor in Nigeria were reported in the *Voice of the Poor*, to have 'complained of inability to obtain justice when wronged.'¹⁰⁴¹ It thus means that a strategy for realizing the right of equal access to justice for the poor is very important in lifting the poor out of poverty.

'Widespread *access* to justice is more likely to result in *equal* justice' and 'is an important component in building a rule of law that is applicable to the powerful as well as to the weak'.¹⁰⁴² The final report of the Special Rapporteur on human rights and extreme poverty noted that an issue 'which is beginning to assume dramatic proportions

¹⁰³⁹ Access to justice can be difficult, especially for poor people, who do not have means of financial support or access to legislative proceedings and major reports in local languages. See Commission for Africa Report, p. 143.

¹⁰⁴⁰ See UNDP, Human Development Report 2000, op. cit. p. 37.

¹⁰⁴¹ See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. p. 99.

¹⁰⁴² See John E. Bonine, op. cit.

is the impunity with which the most fundamental human rights of persons living in poverty and on the fringes of society are violated'.¹⁰⁴³ An effective right of access of the poor to justice will stem the impunity which usually greets the violation of human rights of the poor, to ensure that all actors are brought to account and also to empower them.¹⁰⁴⁴

Although human rights treaties and even Guideline 13 provides for the key features to be addressed in ensuring equal access to justice for the poor, the procedural details in terms of models in achieving this are however lacking. The importance of exploring effective mechanisms to achieve this especially in a developing country like Nigeria, which is the focus of this work, is very compelling.

In the next sub-heading, existing measures in Nigeria towards facilitating the poor's right of equal access to justice and its adequacy in meeting the above provisions will be examined.

3.8 EXISTING MEASURES TO ASSIST THE POOR IN ACCESSING JUSTICE IN NIGERIA AND SUGGESTIONS TO IMPROVE THEM

There are existing measures for accessing justice in Nigeria, some of which are directly targeted at facilitating the poor's access to justice. Some of the said measures are:

3.8.1 Free legal aid for the poor through the court - proceedings *in forma pauperis* (IFP) or pauper's petition

In Nigeria, the poor can get free legal aid through the courts, to sue or defend a matter no matter the subject matter of the suit. Under what is referred to as proceedings *in forma pauperis* under the High Court Law of each State in Nigeria. The High Court may admit an indigent person to sue or defend *in forma pauperis* if satisfied that his/her means do not permit him to employ legal representation in the prosecution of his case and that he has reasonable grounds for suing or defending as the case may be. The higher courts also have this power, the Court of Appeal in section 26¹⁰⁴⁵ and the Supreme Court in section 28,¹⁰⁴⁶ under which the Courts are empowered to assign counsel to any appellant who is not financially capable to prosecute an appeal or other proceedings.

¹⁰⁴³ See Special Rapportuer, Mr. Leandro Despouy's final report (E/CN.4/Sub.2/1996/13), op. cit. para 164.

¹⁰⁴⁴ See UNPD, Human Development Report 2000, op cit p. 13.

¹⁰⁴⁵ See The Court of Appeal Act (Cap 75) Laws of the Federation of Nigeria 1990.

¹⁰⁴⁶ See The Supreme Court Act (Cap 424) Laws of Federation of Nigeria 1990.

In Lagos State for instance, this is provided in Order 47 of the High Court of Lagos State Civil Procedure Rules.¹⁰⁴⁷ A person seeking relief under this Order shall write an application to the Chief Judge accompanied by an affidavit, signed and sworn by the application himself, stating that by reason of poverty he is unable to afford the services of a Legal Practitioner. If in the opinion of the Chief Judge the application is worthy of consideration, the Chief Judge shall appoint a legal practitioner to act for the applicant.

The Court fees payable by a person admitted to sue or defend *in forma pauperis* may be remitted either in whole or in part as a judge may deem fit and a person so admitted to sue or defend shall not, unless the judge otherwise orders, be liable to pay or be entitled to receive any costs. In order to prevent back door exploitation, the Order further provides in Rule 5(1) that the legal practitioner shall not, except by leave of the Chief Judge, take or agree to take any payment whatsoever from the applicant or any other person connected with the applicant or the action taken or defended thereunder.

If the applicant however pays or agrees to pay any money to any person whatsoever either in connection with his application or the action taken or defended thereunder, the order appointing the legal practitioner shall be revoked. In order to protect sudden withdrawal by the lawyer for any reason, the law provides that neither the applicant nor the legal practitioner assigned to him shall discontinue, settle or compromise the action without the leave of a judge.

In order to prevent an abuse of this provision, the Order provides in Rule 5(3) that if the legal practitioner assigned to the applicant discovers that the applicant possesses means beyond those stated in the affidavit, if any, he shall at once report the matter in writing to the registrar.

The Order also allows a poor person to appeal *in forma pauperis* by leave of the trial or the appellate court but only on grounds of law. The provisions of law in this regard are being applied in a very limited manner by the Nigerian judiciary and to the provision of counsel to indigent accused persons standing trial for capital offences only. It has not been extended to other areas such as fundamental rights enforcement.¹⁰⁴⁸ But there is nothing in the provisions that suggests that it should be limited to indigent persons in criminal matters alone, as the Order clearly provides that the Court may admit an indigent person to sue or defend or defend a matter and suing presupposes a civil action.

The need for the court to extend the proceedings to civil matters in practice becomes compelling because it has been doubted that 'where a party presents her own case in court personally without the assistance of a lawyer, whether such a hearing can be considered as fair? This is because it has been considered important to ensure the fair administration of justice, such that a party in civil proceeding will be able to participate effectively and be able to put forward all facts in support of her claim.'¹⁰⁴⁹

¹⁰⁴⁷ See High Court of Lagos State (Civil Procedure Rules) 2004.

¹⁰⁴⁸ See *Josiah v. The State*, [1985] N.W.L.R. (Pt.1) p.125; *The State v. Gwonto*, [1983] 8 S.C. p. 67.

¹⁰⁴⁹ See *P, C and S v United Kingdom* (2002) 35 EHR 31 para 91 cited in Budlender, Geoff, *Access to Courts*, 121 S. African L.J. 339 (2004) p. 341.

Access to court is very crucial in enforcing fundamental rights and even in the justice system. In other jurisdictions, granting an order for the plaintiff's motion to proceed *in forma pauperis*, the court held that the purpose of the provision *in forma pauperis* is to provide meaningful access, not a barrier, to the indigent seeking relief in court since poverty should not make it impossible for a plaintiff to file a legitimate lawsuit.¹⁰⁵⁰

In other jurisdictions, considering a plaintiff's motion to proceed *in forma pauperis* the courts usually interpret the words 'unable to pay fees' to mean that paying such fees would constitute a serious hardship for the plaintiff, and not that such payment would necessarily render him destitute.¹⁰⁵¹ The Nigerian's provision for proceedings *in forma pauperis* adequately covers both the waiving of fees and provision of free legal representation, which can be quite helpful for the poor in having equal and effective access to justice. This procedure is not peculiar to Nigeria.¹⁰⁵²

¹⁰⁵⁰ See the U.S. case of *David F. Spencer v. United States* (No. 05-511T Filed: July 28, 2005 unreported <<http://www.cofc.uscourts.gov/Unpublished%20Decisions/Horn.Spencer.OR1.pdf> > accessed 18 October 2007.

¹⁰⁵¹ See *Jacob Stephen Brown v. The United States* (unreported Suit No. 07-277 C Filed: 14 June, 2007 decided by the United States Court of Federal Claims <<http://www.uscfc.uscourts.gov/Opinions/Hewitt/07/HEWITT.Brown061407.pdf>> accessed 18 October 2007.

¹⁰⁵² In England for example, for a very long time the poor have been provided for in the legal system by a number of ways. In former times, poor people who could not afford the cost of accessing justice have been 'met through special tribunals and by providing legal assistance to indigents appearing in regular courts. (Special tribunals designed to meet the needs of poor persons included the General Eyre, the Chancery, the Star Chamber, the Court of Requests and later on, the county courts). See Pankratz, Jeffrey R., op. cit. p. 1101 and note 58. There were also suits *in forma pauperis* which 'were permitted actions in the regular courts without payment of prohibitive court costs. Over time, in view of the widespread use of counsel, this writ came to include the provision of counsel for indigent litigants. In 1495 the practice was codified in a statute providing for assigned attorneys to prepare and handle cases for indigent parties.' See Pankratz, Jeffrey R., op. cit. p. 1101 and note 59 for the statute in reference: 2 Hen. 7, ch. 12 (1495), reprinted in I. Callison, *Courts of Injustice*, 595 (1956). Also in the US, the poor have always been provided for from time in memoriam, as most of the States Constitution have provisions one way or the other on this. For Instance, the 1970 Constitution of Pennsylvania, in Article IX, Section II, provided to the following effect: "All courts shall be open and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. See I. Callison, op. cit. cited in Pankratz, Jeffrey R., op. cit. p. 1102 In the United States of America, an indigent person can proceed *in forma pauperis* under 28 U.S.C. section 1915 (a) (2000) of the Federal Statute, it provides that '(a) (1) Subject to subsection (b) any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.' The two requirements here are i.) inability to pay and, ii.) belief in a redress. The court may also dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious. See D'Alemberte, Talbot, *The Role of the Courts in Providing Legal Services: A Proposal to Provide Legal Access for the Poor*, 17 Fla. St. U. L. Rev. 107 (1989 -1990) p. 107.

It is contended by this work that the Rules did not envisage that applicants should pay to have their rights enforced; hence there is no provision for fees in it.¹⁰⁵³ This work therefore advocates that considering the level of poverty and low level of development in Nigeria, litigating fundamental rights should be free for the poor. The stipulation of fees should not serve as a condition for the enforcement of rights for the poor, in order to make the poor have access to the courts.¹⁰⁵⁴ This is because litigating human rights enforcement should be a social service and the court must give the benefit of the doubt to the levying of a price to enter the temple of justice, otherwise the profit making disguised as court-fee, will amount to sale of civil justice.¹⁰⁵⁵

The idea that justice should not be rationed on the basis of ability to pay is not a new one, as the quotation from the Magna Carta, Chapter 40 which provides in part¹⁰⁵⁶ "*To no one will We sell, to none will We deny or delay, right or justice.*"¹⁰⁵⁷ A right of

¹⁰⁵³ In the U.S. case of *re Oliver*, 682 F.2d 443, 446 (3d Cir. 1982) (finding that a court must protect the right of indigent persons to have access to the court system) it was held that filing fees and service fees, cost of preparing a defence of an indigent defendant in criminal cases and the right to counsel in criminal matters at trial, on appeal, can be a problem for the poor. So that poverty must not constitute a ground of discrimination to being heard access to courts is very important in order to ventilate one's grievances and the poor must be given an opportunity to be heard without being shut out on grounds of inability to pay fees or engage the services of a lawyer. Also, it was held that filing fees can deny a poor litigant a right of appeal that is constitutionally guaranteed. Also in *Griffin v. Illinois* (351 U.S. 12 (1956 cited in James A. Martin, *Constitutional Law - Indigent Filing Fee as a Condition Precedent to Discharge in Bankruptcy Held Unconstitutional*, Emory Law School Journal of Public Law, 21 J. Pub. L. p. 240 (1972 at 240) the U.S. Supreme Court held that a convicted indigent was denied equal protection and due process when denied a statutory right of appeal because of inability to pay the necessary fees to acquire a transcript. It was also held to deny the accused a fair trial.

¹⁰⁵⁴ In *Boddie v. Connecticut* (401 U.S. 371 (1971) See also Laskow, Paul J., *Boddie v. Connecticut: Free Access to Civil Courts for Indigents*, 76 Dick. L. Rev. 747 (1971 – 1972) p. 747 where the author referred to the decision in that case as 'increasing the capacity of the legal system to afford redress of grievances to a socio-economic class which was without access to the judicial process due to indigency.') A class action for women desiring to obtain a divorce was shut out because of the petitioners' inability to pay the filing fees required by the State law. The U.S. Supreme Court held that shutting the petitioners out on grounds of their poverty to be a violation of the right of the petitioners' right to due process and equal protection. Compare this with the Irish case of *Airey v. Ireland* (1979) 2 EHCR 305 decided on the basis of the European Convention on Human Rights where the applicant sought an order of judicial separation from her husband and could not afford to hire a lawyer to represent her and legal aid was not yet available in Ireland. She could not get the order. The European Court of Human Rights decided that this violated her right to access a court for determination of her civil rights and obligations provided in Article 6 of the European Convention of Human Rights. The Court also held that the Convention intended to guarantee not rights that are theoretical or illusory but rights that are practical and real. It further held that there was a right to legal assistance if it was indispensable for effective access to the courts and consequently, the self-representation of Mrs Airey in the case without the assistance of a lawyer was ineffective given the complex procedure of the Irish High Court and the relevant laws, as she would not be able to present her case properly and effectively. See Also, *ESR.Net v. Airey v. Ireland* (1979) 2 EHCR 305. <http://www.esr-net.org/caselaw/caselaw_show.htm?doc_id=400936> accessed 19 October 2007.

¹⁰⁵⁵ See S.N. Dhyani (1997), *Fundamentals of Jurisprudence (The Indian Approach)*, Central Law Agency, pp. 115-116.

¹⁰⁵⁶ See Magna Carta, 1215, 16 John Ch. 40 cited in Pankratz, Jeffrey R., *Neutral Principles and the Right to Neutral Access to the Courts*, 67 Ind. L.J. 1091 (1991-1992), p. 1091.

¹⁰⁵⁷ Ibid.

access by all citizens to the courts regardless of the ability to pay has been canvassed.¹⁰⁵⁸

One of the reasons for imposition of filing fees is for revenue generation.¹⁰⁵⁹ While business interest litigation may be an avenue for revenue generation, it will certainly inhibit the enforcement of the fundamental rights of the poor. The right of equal access to free and independent courts has been described as a right which underpins all other human rights.¹⁰⁶⁰ 'The second justification for the imposition of the filing fee - that it deters frivolous litigation - is founded upon the belief that one will think twice before instituting a suit without merit when he realizes that it is going to cost him money. Those that can easily afford to pay the filing fee and are unlikely to be deterred from harassing the Court with a frivolous suit simply because they are required to pay a modest filing fee. It is only the indigent who will be effectively deterred from coming to court with a questionable cause'.¹⁰⁶¹

The adverse effect of filing fees however takes its toll on the poor, as the filing fee does not merely deter frivolous suits by the poor - it effectively precludes the institution of any suit by an indigent too poor to pay the fee whether the litigation is frivolous or not. And the cruel irony is that it is the poor who may more frequently have legitimate legal grievances than those who can afford to pay.¹⁰⁶²

The government owes a duty to support the people in a bid to enforce a violation of their rights. According to Professor H. L. A. Hart, *"nothing is more likely to bring freedom into contempt and so endanger it than failure to support those who lack, through no fault of their own, the materials and social conditions and opportunities that are needed if a man's freedom is to contribute to his welfare."*¹⁰⁶³

The government's duty to respect, protect and fulfil rights includes taking special measures in respect of the poor and vulnerable groups.¹⁰⁶⁴ Some of these measures include preventing violations by other actors and taking legislative, budgetary, judicial and other measures to protect and fulfil rights.¹⁰⁶⁵ It has therefore been contended that to deny an individual an opportunity to litigate his legal claims because he is unable to pay the necessary filing fees, is to deny him access to courts on the basis of wealth.¹⁰⁶⁶ It

¹⁰⁵⁸ Ibid. See also, Brenner, Donald B, *The Right of Access to Civil Courts under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?*, 19 Rutgers L.J. 399 (1981-1982), p. 399.

¹⁰⁵⁹ This is because the argument that filing fees provide revenue to maintain the courts system, in most cases is not valid as most of the court's resources come from legislative appropriations and not from the filing fee. See Kreppel, Gary, *Free Access To The Civil Courts As A Fundamental Constitutional Right: The Waiving of Filing Fees For Indigents*, 8 New Eng. L. Rev. 275 (1972 - 1973) p. 293.

¹⁰⁶⁰ See X, *Equal Access to Free and Independent Courts*, op. cit. p. 681.

¹⁰⁶¹ See Kreppel, Gary, op. cit. p. 293.

¹⁰⁶² See Kreppel, Gary, op. cit. p. 293.

¹⁰⁶³ See John Dewey Lecture, The Columbia Law Alumni Observer, Dec. 20. 1978, cited in Weinstein, Jack B, *The Poor's Right to Equal Access to the Courts*, 13 Conn. L. Rev. 651 (1980 - 1981) p. 653.

¹⁰⁶⁴ See UNDP, Human Development Report 2000, op. cit. p. 93.

¹⁰⁶⁵ Ibid.

¹⁰⁶⁶ See Kreppel, Gary, op. cit. p. 275.

was further contended that to deny a citizen access to civil courts on the basis of wealth is violative of the equal protection clause,¹⁰⁶⁷ and that access to civil courts is a fundamental right, which cannot be denied to any citizen too poor to pay a statutory filing fee.¹⁰⁶⁸

Also, it has been argued that 'the payment of a filing fee as a prerequisite of access to the civil courts amounts to a discrimination practised against the poor on the basis of wealth,' just like any other discrimination based on colour, race or religion, given the usual limited legal assistance for the poor.¹⁰⁶⁹ It has therefore been submitted that preconditioning access to the civil courts on the payment of a statutory filing fee results in a forbidden classification and an invidious discrimination against the poor.¹⁰⁷⁰ The effect of the filing fee is to classify individuals into two categories: (1) those who can afford access to the courts; and (2) those who cannot. Thus, the law favours those who can afford to pay the filing fee and stigmatizes those who cannot so as to deny them the exercise of the fundamental constitutional right to judicial redress.¹⁰⁷¹

Proceedings *in forma pauperis* despite its potential for facilitating access of the poor to justice, has been attacked on the following grounds:¹⁰⁷²

- i.) that allowing the waiving of filing fees for an indigent client lies solely with the discretion of the judge;
- ii.) that such discretion has been marked by abuse;
- iii.) that *in forma pauperis* legislation may not be invoked as a matter of constitutional right.

What is found to be particularly objectionable in *in forma pauperis* proceedings is the fact that waiver of official charges lies in the discretion of the court, a discretion rarely challenged or reviewed, which further decreases the efficacy and significance of *in forma pauperis* statutes for poor litigants.¹⁰⁷³ This is coupled with the fact that judicial discretion has often been invoked adversely to the interests of the indigent in his quest for access to the civil courts, and that often the judges have been hostile toward allowing

¹⁰⁶⁷ Equal Protection Clause of the Fourteenth Amendment," U.S. Const. amend. XIV, cited in Kreppel, Gary, op. cit. p. 275. The equal protection provision in the U.S. is similar to the right to fair hearing in s. 36 of the 1999 Constitution of Nigeria.

¹⁰⁶⁸ See Kreppel, Gary, op. cit. p. 275.

¹⁰⁶⁹ Ibid at p. 276.

¹⁰⁷⁰ In *Edwards v. California* (314 U.S. 160 (1941) the U.S. Supreme Court per Justice Jackson, (at 181), 'We should say now, and in no uncertain terms that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen ... "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact-constitutionally an irrelevance, like race, creed, or color.' (concurring opinion of Jackson, J, at 184-185) cited in Kreppel, Gary, op. cit. p. 285.

¹⁰⁷¹ See Kreppel, Gary, op. cit. p. 285.

¹⁰⁷² Ibid at p. 276.

¹⁰⁷³ See Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. R. 223, 227 (1970), cited in Kreppel, Gary, op. cit. p. 276.

the indigent to proceed *in forma pauperis*.¹⁰⁷⁴ Consequently, this has resulted in *in forma pauperis* proceedings being instituted less often than the right and the need presents.¹⁰⁷⁵

During the fieldwork, most of the lawyers interviewed were of the opinion that over the years, there has been no publicity about provisions relating to proceedings *in forma pauperis*, hence the provision is hardly ever resorted to. The requirements of writing a letter to the Chief Judge to be accompanied by an affidavit to sue or defend *in forma pauperis* and the qualification of allowing appeals only on points of law were deemed to have robbed the provisions of its good intentions, as these were regarded as stringent conditions for the poor who are mostly illiterates.

3.8.2 Legal Aid

In order to afford indigent citizens who cannot bear the legal cost of enforcing their fundamental rights the capacity to do so, the 1999 Constitution in section 46(4) requires the National Assembly to make provisions for rendering financial assistance to any indigent citizen of Nigeria whose right has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim. The provision however added a proviso that such an allegation of infringement of rights must however be substantial and the need for financial or legal aid real. The National Assembly has not made any law towards this provision to date.

There is the Legal Aid Council which was established in 1976¹⁰⁷⁶ (hereinafter called ‘the Council’) and was mandated by law to provide legal representation to poor persons, whose gross annual income is not more than N5,000 (approx \$40).¹⁰⁷⁷ This has been described as an unrealistically low income threshold, meaning that many Nigerians below the poverty line who are genuinely unable to afford legal service are statutorily excluded from legal assistance.¹⁰⁷⁸ The governing Board of the Council has however recently recommended an upward review of the income ceiling by 1,440 percent to N72,000 (approx \$576), but this is yet to be adopted by government.¹⁰⁷⁹

¹⁰⁷⁴ See Kreppel, Gary, op. cit. p. 276.

¹⁰⁷⁵ See Stumpf and Janowitz, Judges and the Poor: Bench Responses to Federally Financed Legal Services. 21 STAN. L. R. 1058 (1969), cited in Kreppel, Gary, op. cit. p. 276, as a reference for a discussion on judicial attitudes toward *in forma pauperis* proceedings.

¹⁰⁷⁶ See Decree No. 56 of 1976, now the Legal Aid Act Cap 205 (as amended by the Legal Aid (Amendment) Decree No. 22 of 1994), Laws of the Federation of Nigeria 1990.

¹⁰⁷⁷ The classes of people eligible under the scheme are i.) those with no income of any type, ii.) those whose annual income does not exceed N5,000 iii.) referrals by the court, iv.) those whose annual income exceeds N5,000 but to obtain legal services outside the legal aid scheme will place them in the same position as those whose income does not exceed the income ceiling, v.) it is reasonable in all the circumstances to provide the person with legal aid. See Okonkwo C.O., “Legal Aid in Nigeria- Historical and Humanitarian Perspective”, in Sylvia Ada Akpala (ed.) (2001), *Legal Aid Services in Nigeria: the humanitarian perspective*, Snaap Press Enugu, p. 16.

¹⁰⁷⁸ See Chinonye Obiagwu and Chidi Anselm Odinkalu, “Combating Legacies of Colonialism and Militarism”, in Abdullahi Ahmed An-Na’im (ed.) (2003), p. 225.

¹⁰⁷⁹ Ibid.

During the fieldwork, the Director (Research Planning and Statistics) of the Council disclosed the fact that despite the current low income threshold, that the Council has been dynamic in the way it applies the gross annual income ceiling by taking this to be net income (disposable), which excludes basic expenses like rent, utility bills, dependants, etc. He added that after these have been taken into consideration and if an individual still earns above the ceiling, they can still render legal assistance to the person on a contributory basis.¹⁰⁸⁰ In other words, the person will be required to contribute towards legal assistance to be provided.

From its establishment in 1976, to early 2000, the Council had received 50,100 applications for legal aid, out of which it granted 42,515, rejecting 7,585. By that period, it had completed 32,167 cases and had a caseload of 10,348 cases.¹⁰⁸¹ In a country with gross and widespread human rights abuses as mentioned above and a huge population, it is ridiculous that from 1976-2000 the Council received only 50,100 cases. This may be evidence of poor public knowledge about the Council services and that legal aid in Nigeria and/or the Council is inaccessible to the people.

From January to December, 2005, the Council received 2,672 applications out of which it granted 2,311.¹⁰⁸² Compared with other jurisdictions, Scotland with a population of over five million for instance, between the years 2005 and 2006 alone, made 411,290 grants of legal assistance,¹⁰⁸³ while the Australian Legal Aid Commissions provided legal assistance to 269,613 people between 2005 and 2006 alone, and provides legal assistance to on average ¾ million Australians every year! The number of people represented in courts/tribunals for the 2005-2006 period alone in Australia was 158,624, which was almost four times the total applications the Council had granted in almost 24 years!¹⁰⁸⁴

From 1976 to 1994, the Council's legal assistance was limited to capital cases or other serious criminal cases, but the scope of legal assistance was extended as a sequel to the amendment of its enabling law in 1994 to include cases involving the infringement of

¹⁰⁸⁰ It must be noted that in some jurisdictions, legal assistance is rendered to both individuals and corporate bodies who are only required to pay a flat-rate contribution. This is the position in Belgium, where litigants are required to pay a flat-rate of €12.39, but individuals with low resources can still enjoy both primary and secondary legal assistance free of charge. In Belgium however, corporate bodies can only be rendered primary legal assistance, i.e. which excludes detailed legal opinion/assistance and legal representation. See Legal Aid-Belgium, European Judicial Network in civil and commercial matters. <http://ec.europa.eu/civiljustice/legal_aid/legal_aid_bel_en.htm> accessed 6 May 2007.

¹⁰⁸¹ See U.A. Hassan Baba (Director-General), 'Report on the Operation of the Legal Aid Council of the Federal Republic of Nigeria,' presented to the Annual General Conference of the Nigeria Bar Association, Abuja, 21-25 August, 2000, p.6 and appendix A. cited in Chinonye Obiagwu and Chidi Anselm Odinkalu, "Combating Legacies of Colonialism and Militarism", in Abdullahi Ahmed An-Na'im (ed.) (2003) op. cit. p. 225.

¹⁰⁸² See Legal Aid Newsletter, vol. 1 No. 3 March, 2006 p. 11.

¹⁰⁸³ See Scottish Legal Aid Board Annual Review 2005-2006 p. 13.
<http://www.slab.org.uk/annual_report_2005_2006/annual_review_2005_2006.pdf> accessed 6 May 2007.

¹⁰⁸⁴ See Australian National Legal Aid, <<http://www.nla.aust.net.au/category.php?id=1>> accessed 6 May 2007.

fundamental rights as guaranteed under the Constitution, and criminal cases such as common assault, affray, stealing and rape.¹⁰⁸⁵ The services of the Council now cover virtually all criminal cases with the exception of armed robbery.¹⁰⁸⁶

The report of the Council referred to above, shows that as at 2000, the Council had 46 salaried lawyers, assisted by nine hundred other lawyers in private practice, who work with the Council on a subsidized consultancy basis in casework across the thirty-six states of Nigeria and the Federal Capital Territory, Abuja. Although the Council has offices in the 36 States of Nigeria, the capacity of those offices are greatly limited in any meaningful impact as the offices have only 2 lawyers each, with the exception of Lagos State which have 5 lawyers, for a State with a population of over 9 million (2006 estimate). The smallest State in Nigeria by population has 1.7 million people and the Federal Capital Territory has not less than 1.4 million people.¹⁰⁸⁷ The number of lawyers was only increased in December 2005 and before then each State office had 1 lawyer according to the Council's Director. It thus has great problems in meeting demands.

The Council's 46 salaried lawyers, assisted by another 900 other private lawyers are just grossly inadequate in a country with a population of 140 million people and numerous human rights abuses. In Scotland with a population over 5 million, there were 1,361 solicitors firms registered with the Scottish Legal Aid Board as at 2006, to offer legal assistance in both civil and criminal matters,¹⁰⁸⁸ while in Australia which has 8 independent Legal Aid Commissions, with a population over 20 million (2007 estimate), there was an unbelievable total number of 271,495 duty lawyers for 2005-2006.¹⁰⁸⁹

¹⁰⁸⁵ See Okonkwo C.O., "Legal Aid in Nigeria-Historical and Humanitarian Perspective", in Sylvia Ada Akpala (ed.) (2001), op. cit. p. 15.

¹⁰⁸⁶ Under the second schedule of the Legal Aid Act, the scope of services under the Criminal Code includes murder, manslaughter, maliciously or wilfully wounding or inflicting grievous bodily harm, assault occasioning actual body harm, stealing, affray, rape and equivalent offences under the Penal Code. Also included are civil claims in respect of accidents and claims for damages for breach of Fundamental Rights, as guaranteed under Chapter IV of the 1999 Constitution.

¹⁰⁸⁷ The 2006 census results in Nigeria show 36 States and the Federal Capital Territory (FCT), Abuja to have the following populations: Kano 9.38 million, Lagos 9.01 million, Kaduna 6.06 million, Katsina 5.79 million, Oyo 5.59 million, Rivers 5.18 million, Bauchi 4.67 million, Jigawa 4.34 million, Benue 4.21 million, Anambra 4.18 million, Borno 4.15 million, Delta 4.09 million, Niger 3.95 million, Imo 3.93 million, Akwa Ibom 3.92 million, Ogun 3.72 million, Sokoto 3.69 million, Ondo 3.72 million, Osun 3.42 million, Kogi 3.28 million, Zamfara 3.25 million, Enugu 3.25 million, Kebbi 3.23 million, Edo 3.21 million, Plateau 3.17 million, Adamawa 3.16 million, Cross River 2.88 million, Abia 2.83 million, Ekiti 2.38 million, Kwara 2.37 million, Gombe 2.35 million, Yobe 2.32 million, Taraba 2.3 million, Ebonyi 2.17 million, Nasarawa 1.86 million, Bayelsa 1.7 million, FCT, Abuja 1.4 million. See X, Census results by States, Daily Independent, 10 January 2007 <<http://odili.net/news/source/2007/jan/10/607.html>> accessed 5 January 2008.

¹⁰⁸⁸ See Scottish Legal Aid Board Annual Review 2005-2006 p. 14 <http://www.slab.org.uk/annual_report_2005_2006/annual_review_2005_2006.pdf> accessed 6 May 2007.

¹⁰⁸⁹ See Australian National Legal Aid. <<http://www.nla.aust.net.au/category.php?id=1>> accessed 6 May 2007.

The Report of the National Working Group on Prison Reforms and Decongestions,¹⁰⁹⁰ indicated how grossly deficient Nigeria's legal aid is. The report stated that almost 80 percent of convicts in prison, who have appeals pending, have no legal representation. Also, only 20.5 percent of the convicts out of 11,763 and 15 percent awaiting trial prison inmates out of 20,888 inmates have legal representation. Another critical deficiency in the legal aid scheme in Nigeria which has been noted is the absence of the provision of legal aid during arrest and interrogation of suspects. This indicates that the right to be legally represented is of the most pressing importance only to those facing criminal charges.¹⁰⁹¹ The inevitable link between socio-economic conditions and crime means that a great many persons coming before the courts on criminal charges do not have the means to pay for representation.¹⁰⁹²

In the U.K., Scotland, South Africa and a host of other countries, legal aid apart from representation in court, covers legal assistance at the police stations and even legal advice on a variety of legal problems. Also in these countries as in others, a Legal Aid Helpline provides sundry legal advice to people over the telephone, which in most cases is toll free. The Headquarters of the Council has a helpline, but this service is not available at the State and Zonal offices.

The Council is also grossly under funded and cannot afford to retain the number of lawyers required to effectively operate the scheme; the current yearly budgetary allocation for the Council according to the Director is about N105 million (approx \$840,000) and overhead costs are said to be an average of N5 million (about \$40,000) a month, and that capital project will take almost N45 million (about \$360,000). This is a mere pittance for a country with 140 million people. Scotland with a population of over five million (2005 estimate) for instance, spent the sum of £147.9 million (approx \$255 million) between from 2005-2006 alone, which translated into 411,290 grants of legal assistance.¹⁰⁹³ Also, in the UK with a population of over 60 million (2007 estimate), over £2 billion (about \$3.4 billion) have been spent on legal aid disbursements in the last decade (1997-2007).¹⁰⁹⁴

The Council in this regard lacks the human and material resources to provide efficient and sufficient legal aid services, offering both choice and quality services. However there are some human rights NGOs and other bodies that run various legal aid services for the poor and the less privileged, in addition to the services provided by the Council. The Nigerian Bar Association (NBA) offers limited *pro-bono* legal assistance. The Justice and Peace Commission of the Catholic Mission, equally provides free legal

¹⁰⁹⁰ See The Report of the National Working Group on Prison Reforms and Decongestion, February, 2005, Federal Republic of Nigeria, p. 6.

¹⁰⁹¹ See Richardson, Ivor, op. cit. p. 170.

¹⁰⁹² Ibid.

¹⁰⁹³ See Scottish Legal Aid Board Annual Review 2005-2006 p. 13
<http://www.slab.org.uk/annual_report_2005_2006/annual_review_2005_2006.pdf> accessed 6 May 2007.

¹⁰⁹⁴ See Legal Services Commission, Legal Aid Reform: the Way Ahead, Department for Constitutional Affairs, November, 2006 <<http://www.official-documents.gov.uk/document/cm69/6993/6993.pdf>> accessed 6 May 2007.

assistance to the poor and the less privileged in Nigeria. Their activities also in some cases penetrate the rural areas more than most of the human rights NGOs.

The ability to access justice depends not only on the operation of the courts, but also on the ability to be represented before them.¹⁰⁹⁵ ‘The right to appear before a court may be of little value in the absence of effective representation.’¹⁰⁹⁶ This is however not to suggest that justice is automatic once a litigant is represented by counsel.¹⁰⁹⁷ Representation by counsel is often necessary for an individual to fully enjoy the right of access to the courts. Yet the high cost of legal representation, necessary for the protection of legal rights and for the just administration of the legal system, often places such representation beyond the reach of the poor.’¹⁰⁹⁸

There is need for improved access to legal aid, both in terms of human and material resources to make it effective. The Council should be well funded by the government, although the Council now has a dedicated fund which was established through a fundraising campaign tagged ‘Legal Fund Raise: Giving Voice to the Voiceless’, launched on 15th February, 2005 to complement budgetary allocations to the Council. The fund has been used to establish a mediation centre and is also being used for other things such as preparation of records of appeal, hiring of vehicles to convey suspects to courts, processing of bail for indigent accused persons, payment of fines for convicted persons for minor offences, who cannot afford to pay their fine,¹⁰⁹⁹ sponsoring of psychiatrist suspects to hospital for assessment to enable trials to commence, etc. This is to address bottlenecks that constitute setbacks to the criminal justice system. Others to be addressed are publicity/public enlightenment, training, provision of Mobile Legal Aid Clinics to reach the grassroots, etc.¹¹⁰⁰

More legal officers are needed to be employed to be able to cater for poor people in need of legal representation to ensure that the poor are able to obtain redress for violation of their rights.¹¹⁰¹ It is just unimaginable how the Council with about forty-six (46) lawyers, can meaningfully give legal representation to about 9,410 convicted

¹⁰⁹⁵ See Richardson, Ivor, op. cit. p. 169.

¹⁰⁹⁶ See Richardson, Ivor, op. cit. p. 170.

¹⁰⁹⁷ Ibid.

¹⁰⁹⁸ See D’Alemberte,, Talbot, op. cit. p. 107.

¹⁰⁹⁹ In her report, the Independent Expert on human rights and extreme poverty stated that Extreme poverty often brings people into conflict with the forces of law and order and with the justice system. And prison populations consist mainly of extremely poor people. These people remain in prison after serving their terms because they cannot pay their fines. She therefore recommended that rules of legal systems be adjusted to this reality, by introducing alternatives to imprisonment, and that special training must be provided for judicial personnel. She also recommended that specific arrangements must be introduced in all States to ensure free access to legal aid and the assistance of counsel for all extremely poor persons, with special training given to the available professionals. See E/CN.4/2000/52 of 25 February 2000, the second report of the Independent Expert on human rights and extreme poverty, paras 107 and 108 p. 31.

¹¹⁰⁰ See Legal Aid Newsletter, a publication of Legal Aid Council, vol. 1 No. 2 August 2005 p. 13

¹¹⁰¹ In her report, the Independent Expert on human rights and extreme poverty, emphasized the need for each State to find specific ways of ensuring that legal aid and legal counsel is available free of charge to all persons living in extreme poverty. Appropriate training should be given to the experts concerned. See E/CN.4/1999/48 Report of the Independent Expert on human rights and extreme poverty, para 141.

prisoners who have appeals,¹¹⁰² and about 15,666 inmates awaiting trial who have no access to legal representation according to the 2005 Report of the National Working Group on Prison Reforms and Decongestions. During the fieldwork, it was opined that considering the Nigerian population, the legal aid fund should not be less than \$140 million for the Council to be able to give effective and efficient legal assistance on rights enforcement.

It must be pointed out here that some of the human rights activists interviewed during the fieldwork averred that the Nigerian Bar Association has performed below expectation as regards coming to the aid of poor litigants and their accessing justice in Nigeria. The fieldwork however gathered from a top member of the Nigerian Bar Association that the current leadership of Olisa Agbakoba (SAN), who is a renowned human rights activist, has promised to reposition the Bar in order to make *pro bono* legal services available throughout the 88 branches of the Bar Association in Nigeria. It is recommended that the Bar Association should expose lawyers more to human rights issues through regular conferences and seminars, in order to incite their interests in rights protection.

In 2006 the Council newly introduced the Police–Duty Solicitor Scheme in collaboration with the Nigerian Police and the Open Society for Justice Initiative. The aim of the scheme is to provide from the beginning of the criminal justice process, a system through which legal advice and assistance can be given by lawyers to those who are in conflict with the law at the point of arrest and before their statements are obtained and/or before arraignment. This is to ensure respect for constitutional rights of suspects, detainees and accused persons, the majority of whom are oblivious of their rights. The scheme also sought to provide the users of the criminal justice system, especially the poor, unrepresented or illiterates, with basic legal advice and assistance, which are to be rendered by lawyers under the employment or supervision of the Council, suspects in police custody or accused. There are currently pilot projects of the scheme in four States of Kaduna, Sokoto, Imo and Ondo, with plans to extend this to other States of the Federation.¹¹⁰³

The Council’s Director informed this work that the Legal Aid Amendment Bill 2005 will introduce other legal units as it exists in other jurisdictions.¹¹⁰⁴ According to the Director, other innovations to be brought into the Council includes rendering free legal assistance in all criminal matters without restraint, provisions of assistance to indigents against the State and private organizations, the creation of access to justice funds which will enable the poor to have access to justice, widening the eligibility to the legal aid services to people whose income does not exceed 200 percent of the existing minimum

¹¹⁰² It has been stated that the fact that chances of an acquittal are much higher in criminal cases where the accused is represented by counsel has been attested. See X, *Equal Access to Free and Independent Courts*, op. cit. p. 684.

¹¹⁰³ See Anthony Nwapa, *Police-Duty Solicitors Scheme (PDSS) in Nigeria- a Welcome Development*, Legal Aids Newsletter, vol. 1 No 3 March 2006 p. 5.

¹¹⁰⁴ These are i.) Criminal Litigation Unit, ii.) Civil Litigation Unit, and iii.) Community Litigation Unit.

wage in Nigeria, introduction of prison monitoring functions, review of cases of inmates awaiting trial, partnering NGOs, law clinics in the Law Faculties, etc.

It is the primary responsibility of government, both federal and State to assist the poor and the less privileged to have access to justice, by making justice a reality for those in need of it but who cannot afford it. In this regard, the efforts of some States, like the Lagos State Government, who pioneered the establishment of the Directorate for Citizens' Rights,¹¹⁰⁵ which other States like Ogun, Oyo, Ekiti, Kaduna and River have emulated, with some modifications, are laudable. The said States have instituted free legal aid scheme and mediation centres for the poor, including advice, under the auspices of the Ministries of Justice. Some of these have been very effective and many cases have been resolved, as respondents often turn up for meetings as a result of the government's involvement. The Lagos State Directorate for Citizens Rights has the Human Rights Protection Unit, which accepts and considers petitions on alleged human rights violations.

This provides cheap redress and also assists in decongesting the courts. As at September, 2006 when the Lagos State Directorate was interviewed,¹¹⁰⁶ over 55,000 people were said to have accessed justice through the system.

The Ogun State Citizens' Right Department, whose Director was interviewed during the fieldwork, assists the poor and the less privileged in securing bail at police stations, filing fundamental enforcement cases, ensuring that those that require the Director of Public Prosecutions' advice get it on time, engages in prison watch and defends criminal matters. This Department also makes provision for feeding and transport allowance for accused persons who were set free by courts, to enable them to reunite with their families. These efforts are commendable and it is recommended that other States in Nigeria who do not currently have legal aid schemes should put one in place.¹¹⁰⁷

The problem found with the system during the fieldwork has been with the elites, who were said to be ignoring letters of invitation for mediation from such centres, thereby forcing the poor who cannot afford the cost of going to the traditional courts to seek redress to abandon their rights. It is therefore recommended that lawyers should be carried along in the free legal and mediation schemes for the poor, for it to record huge success. This has become necessary because most lawyers have the impression that the

¹¹⁰⁵ The Lagos State government created the Directorate for Citizens Rights. The Directorate have units- i.) The Human Rights Protection Unit (HRPU), ii.) The Office of the Public Defender (OPD), iii.) The Citizens Mediation Centre (CMC) iv.) The Consumer Rights Protection Unit (CRPU) and Justice Now Publication Unit (JNPU). The Citizens Mediation Centre was established through the Lagos State Citizens Mediation Centre Law, 2004 Cap L79 Laws of Lagos State. The Office of the Public Defender has a legal backing through the Lagos State Office of the Public Defender Law 2004 Cap L82 Laws of Lagos State.

¹¹⁰⁶ This work interviewed the Director of the Directorate of the Citizens Rights, Lagos State Ministry of Justice, who is the head of the Directorate.

¹¹⁰⁷ This information was gathered from the Director of the Ogun State Citizens' Right Department in October 2006 during the fieldwork. The Department also made available to this work, pamphlets and manuals on their duties.

government is trying to discourage people from contacting them in order to take matters to the courts through the establishment of such centres, thereby robbing them of clientele, so such lawyers in turn encourage invited parties not to turn up at the centres.¹¹⁰⁸

It is also recommended that the government which has more resources should establish more legal aid centres in the rural areas to make free legal services more accessible to the rural poor, as most of the free legal schemes of the government are currently located in the urban centres - this fact was discovered during the fieldwork. In South Africa for instance, all round legal aid is given to as many poor people as possible, including vulnerable groups such as women, children and the rural poor on different issues which concern and affect their livelihood.¹¹⁰⁹ In other jurisdictions as well, legal aid takes care of court fees, including the cost of obtaining certified true copies and so on.¹¹¹⁰

It is hoped that governments will continue to fund and improve the free legal aid scheme because 'legal aid isn't about procedures and policies - it's about people,'¹¹¹¹ it is an integral part of a welfare state and it needs to continue to fight against social exclusion. 'Access to justice, and legal aid or assistance go hand in hand in order to facilitate the contribution of justice mechanisms in the fight against poverty.'¹¹¹² In view of the evolution of the judicial process, including an increasingly complex body of procedural law and an overwhelming reliance on attorneys,¹¹¹³ an indigent's right to counsel and to other legal services have been described as a logical application of a right of access to court in today's world.¹¹¹⁴

¹¹⁰⁸ This information was gathered from the Director of the Directorate for Citizens' Rights, Lagos State in October 2006 and from some of the people who throng the office of the Directorate's Mediation Centre daily for free services. The Directorate of the Citizens' Rights particularly expressed the view that some lawyers do counsel their clients not to honour letters of invitation written by the Directorate, stressing that some lawyers go to the extent of writing petitions against the Directorate alleging that it is constituting itself into court and usurping the powers of the court.

¹¹⁰⁹ See the Mandate of the Legal Aid Board of South Africa.

<http://www.legal-aid.co.za/services/handbook/hb_mandate.htm> accessed 23 April 2007.

¹¹¹⁰ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 260.

¹¹¹¹ See Scottish Legal Aid Board Annual Review 2005-2006 p. 10

<http://www.slab.org.uk/annual_report_2005_2006/annual_review_2005_2006.pdf> accessed 6 May 2007.

¹¹¹² See Lucie Lamarche, *Beyond the Rhetoric of Social Rights for the Poor: the Need to Promote a Methodology aimed at Reinforcing International and National Institutions*, Jurist Seminar -Sao Paulo-May 2003 pp. 26-27.

<<http://portal.unesco.org/shs/en/files/6378/10990361701Lamarche.pdf/Lamarche.pdf>> accessed 16 March 2007.

¹¹¹³ A country's decision to adopt or continue with a cumbersome and technical legal system that has resulted in excluding poor and laymen from access to the system, the State cannot deny responsibility for the poor who cannot use the technical legal system which has evolved from accessing justice, without making provisions to accommodate them. This is because, 'the inability of some citizens to afford lawyers is also the result of choices made by the state.' See Pankratz, Jeffrey R., op. cit. 1110.

¹¹¹⁴ See Pankratz, Jeffrey R., op. cit. p. 1092.

Realizing that it is difficult for disadvantaged groups to have access to legal advice and representation when they feel their rights have been violated, the UK's Department for International Development (DFID) and Nigerian partners in 2002 commenced a project - 'the Security, Justice and Growth' in Nigeria, aimed at improving access to, safety, security and justice for poor people and their livelihoods. The access to justice component among others is aimed at increased capacity for individuals to obtain redress for a breach of their rights, and supporting the provision of services including free legal advice and representation and alternative dispute resolution. The programme has also enabled the creation of law/mediation centres in Jigawa and Enugu States to provide free mediation and legal advice to indigent persons.¹¹¹⁵

The founding father of the legal aid movement in the US, Reginald Heber Smith, summed up the danger inherent in allowing economic inability to disempower people from accessing justice in the enforcement of their fundamental rights, when he stated:

*"Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes in the law itself. And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end."*¹¹¹⁶

It has been stated that despite the fact that a citizen can manage some legal problems without really requiring the services of a lawyer, it is almost impossible to gain access to the courts without legal representation. The result is that a citizen without legal representation will be denied the use of the courts which is basic to the justice system.¹¹¹⁷

In order to ensure equal justice and that these schemes are not unnecessarily duplicated, there is need for a synergy of efforts among all components of the legal, civil society and human rights groups, as it relates to the delivery of legal services to the poor and the vulnerable groups in need of legal assistance in order to enhance coverage and strengthen partnership among the key players in the civil justice system. Law Students' associations can equally mount law clinics that will provide guided legal advice to members of the public, especially the poor in their locality.¹¹¹⁸

¹¹¹⁵ See Department for International Development, Security, Justice and Growth-Nigeria, British Council, 2005.

¹¹¹⁶ See R.H. SMrr, Justice and the Poor 11 (1971) at p. 12, cited in Pankratz, Jeffrey R., op. cit. pp. 1104-5.

¹¹¹⁷ See Tunney, John V., *Assuring Access to the Courts: Attorneys' Fees and Public Interest Litigation*, 2 Litigation 8 (1975 – 1976) p. 8.

¹¹¹⁸ As done in some American and South African Universities, see Vinodh Jaichand, *Public Interest Litigation Strategies for Advancing Human Rights in Domestic System of Law*, Sur International Journal on Human Rights, Yr. 1, No. 1, 1st September, 2004, p. 135.

3.8.3 The Police Service Commission

The Police Service Commission (hereinafter called ‘the Commission’) is provided for in section 153(1)(m) of the 1999 Constitution, for the purpose of performing civilian oversight over the Nigerian police. In this regard, the Commission is charged with the responsibility of the appointment, promotion, dismissal and disciplinary control over every police officer in Nigeria, other than the Inspector-General of Police (IGP).¹¹¹⁹ The Commission is equally responsible for the formulation of policies and guidelines for the appointment, promotion, discipline and dismissal of police officers, identification of factors inhibiting or undermining discipline, formulation and implementation of policies aimed at the efficiency and discipline of the Police, and to carry out such other functions as the President may from time to time direct.¹¹²⁰

The Commission is also responsible for the appointment of Commissioners of Police for each of the 36 States of the Federation¹¹²¹ and has a Board comprising a Chairman and seven other members.¹¹²² The members of the Board are from different professional backgrounds, except one who is a retired senior police officer. Owing to the alleged difficulty of the IGP in instilling discipline and control in the police, especially the lower cadre, the Commission delegated some of its powers to the IGP in respect of all matters of recruitment, appointment, promotions and discipline of policemen from the rank of Corporal and above, up to and including the promotions to the rank of Superintendent of Police.¹¹²³

The Nigerian police are charged with very wide duties such as the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws¹¹²⁴ and under the Police Act, have enormous powers.¹¹²⁵ The above delegation of powers by the

¹¹¹⁹ See Section 6(1)(a) and (b) of the Police Service Commission (Establishment) Act No. 1, 2001; see also Third Schedule Part 1 para 30 of the 1999 Constitution. The Inspector General of Police is appointed by the President on the advice of the Nigerian Police Council. The Nigeria Police Council is a body comprised of the President as Chairman, the Governors of the each 36 States of the Federation, the Chairman of the Police Service Commission and the Inspector General of Police. See also Third Schedule Part 1 para 27 of the 1999 Constitution.

¹¹²⁰ See Section 6(1), (c), (d), (e) and (f) of the Police Service Commission (Establishment) Act No. 1, 2001.

¹¹²¹ See Section 215(b) of the 1999 Constitution.

¹¹²² See Third Schedule Part 1 para 29 of the 1999 Constitution.

¹¹²³ See Police Service Commission 2004 Annual Report, p. 2. The ranks of the Nigerian Police Force are Inspector General of Police (IGP); Deputy Inspector-General of Police (DIG); Assistant Inspector-General of Police (AIG); Commissioner of Police (CP); Deputy Commissioner of Police (DCP); Assistant Commissioner of Police (ACP); Chief Superintendent of Police (CSP); Deputy Superintendent of Police (DSP); Assistant Superintendent of Police (ASP); Inspector (INSP); Sergeant (SGT); Corporal (CPL) and Police Constable (PC). Traffic Wardens - Traffic Warden Grade I (TW I); Traffic Warden Grade II (TW II); Traffic Warden Grade III (TW III) and Senior Traffic Warden (STW).

¹¹²⁴ See Section 214 of the 1999 Constitution and section 4 of the Police Act, 1943, re-enacted by the Police Act 1967 See Cap 359 Laws of the Federation of Nigeria, 1990 (as may be amended in 2004).

¹¹²⁵ See Section 4 of the Police Act.

Commission may seem to be necessary but the concern has been raised during the fieldwork by some of those interviewed whether this step is not retrogressive, since the Commission is to ensure that police officers are held accountable and not shielded by their colleagues from accountability.¹¹²⁶ The reason for this view is that civilian oversight is premised on the belief that cases of police accountability will be efficiently dealt with when civilians are involved in the process than when being handled by the police themselves.¹¹²⁷

The background to the establishment of the Commission has been the sheer lack of accountability for police acts, especially human rights abuses. Over the years, serious complainants such as death or serious injury in police custody resulting from torture at the hand of interrogation officers, destruction of exhibits and evidence, falsification of and tampering with statements, twisting or suppressing material facts in investigations, illegal seizure of property, wrongful or malicious arrest, extortion and bribe-taking, release of suspected criminals (who then turn round to terrorize those who named them as suspects) and other corruptive practices have been reported to the Nigerian Police authorities. Some of the complaints are sometimes taken up by human rights NGOs and legal practitioners on behalf of victims, but are often left unaddressed/ignored in the expectation that the complainants will eventually get tired. Complaints raised by ordinary individual members of the public are simply thrown into the waste paper basket.¹¹²⁸

The impunity that accompanies police human rights violations and other abuses in Nigeria are simply alarming and disturbing, as the police authorities in most cases do not hold perpetrators accountable. Although the police sometimes set up internal boards to deal with cases of abuses in order to assuage the feelings of the members of the public these have never achieved any tangible result.¹¹²⁹ The importance of having an effective civilian oversight over the police is crucial to human rights protection and poverty reduction, in a developing country such as Nigeria judging from the way police acts affect the poor.

Ms. A.Z. Lizin, the Independent Expert on human rights and extreme poverty has identified the role of the police as an important one and as part of a local approach to reduce poverty,¹¹³⁰ owing to the frequency of contacts between extremely poor people and the police, as observed by the Independent Expert during her various visits.¹¹³¹ Combating poverty has been identified to entail ensuring respect for the human rights of

¹¹²⁶ See E.E.O. Alemika and I.C. Chukwuma (eds.) (2003), *Civilian Oversight and Accountability of Police in Nigeria*, CLEEN & Police Service Commission, Lagos –Abuja, p. ix.

¹¹²⁷ See Joel Miller, “Civilian Oversight of Policing: Lessons from the Literature”, in E.E.O. Alemika and I.C. Chukwuma (eds.) (2003), *Civilian Oversight and Accountability of Police in Nigeria*, op. cit. p. 5.

¹¹²⁸ Ibid at p. ix.

¹¹²⁹ See Chidi Anselm Odinkalu, “Changing Roles of Civil Society in Promoting Safety and Security in Nigeria,” in Etanbi E.O. Alemika & Innocent C. Chukwuma, (eds) (2004), op. cit. p. 23.

¹¹³⁰ See E/CN.4/2000/52, the second report of Ms. A.Z. Lizin, p. 15 para 53.

¹¹³¹ Ibid.

the poor, in particular within the judicial system¹¹³² and by the police,¹¹³³ and restraining them from interfering with poor people's pursuit of their rights, whether through torture or arbitrary arrest, illegal detention and false prosecutions and imprisonment, confiscating identity documents, harassing street vendors, beating up innocent people, murder and raping women who go to police stations.¹¹³⁴

By virtue of the foregoing, the police are vital to the protection of rights, accessing justice and poverty reduction efforts in Nigeria. However, the police are viewed with hostility because of their brutality and failure to protect the people who need their protection most:¹¹³⁵ the poor and the vulnerable. In the *Voice of the Poor*, the effect of oppressive policing on the poor was revealed when the poor people repeatedly stress the anxiety and fear they experience because they feel insecure and vulnerable, particularly young men, who are more likely to be picked up by the police.¹¹³⁶

Nigeria's Human Rights Violations Investigation Commission (HRVIC)¹¹³⁷ in its report which was submitted in 2002 gave a scathing report on the police and remarked that like the military, the police stand accused as perpetrators of human rights violations.¹¹³⁸ The report further states that the Nigerian Police have often been a vital link in the chain of conspiracy against justice in many parts of the country and that from the petitions received, it is clear that the police have been used to further the excesses of the rich and the powerful. It further added that the police have been willing agents at the hand of those who have power, from the rich and sometimes dubious businessmen, drug barons, and the top strata of the powerful elite.¹¹³⁹

¹¹³² It has been stated that 'in a society where justice has its goal, the police must be clean, just and respected. The vision of the court would be misty and the administration of justice murky in a corrupt atmosphere. Detention for years of prisoners awaiting trial, continuous complaints of extraction of a confession per vim, Incessant preferment of what is commonly referred to as a 'holding charge' could only create insecurity in the public and general lack of confidence in the organs of justice.' See Hon Justice Kayode Eso (1990), op cit p. 146.

¹¹³³ See E/CN.4/1999/48 report of the Independent Expert on human rights and extreme poverty, p. 32 para 125.

¹¹³⁴ See Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 164.

¹¹³⁵ See UNDP, Human Development Report 2000, op. cit. p. 38.

¹¹³⁶ See Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 151.

¹¹³⁷ The Judicial Tribunal of Inquiry known as the Human Rights Violations Investigation Commission, under the Chairmanship of Justice Chukwudifu Akunne Oputa, was constituted by former President Olusegun Obasanjo, on assumption of office in 1999 by Statutory Instrument No 8 of 1999 as amended by Statutory Instrument No13 of 1999 in exercise of powers conferred on him by the Tribunals of Inquiry Act, Cap 447 Laws of the Federation of Nigeria, 1990. The Commission was commonly known as 'Oputa Panel' in reference to the Chairmanship's name. The Commission's terms of reference among others was to ascertain or establish the causes, nature and extent of human rights violations or abuses with particular reference to all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria between 1 January, 1984 and 28 May, 1999 and recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress the injustices of the past and prevent or forestall future violations or abuses of human rights.

¹¹³⁸ See The Human Rights Violations Investigations Commission Report, May, 2002, *Synoptic Overview*, pp. 52-53 <<http://www.dawodu.com/oputa1.pdf>> accessed 23 July 2007.

¹¹³⁹ Ibid.

The HRVIC then chronicled the various ways in which the police have perpetrated human rights abuses, such as victims of human rights violations at the hand of the police often ending up as the accused; policemen and policewomen sometimes destroy evidence, losing it outright or distorting it against the petitioner - the objective of which is to instil fear and deny the victims the chance to follow up their case against the police - there have been cases of people who died in dubious circumstances in police custody, or were physically abused and injured, or victims of intimidation, unable to get justice because the police were clever in protecting some of its officers involved in such gross human rights violations, that the Nigerian Police were good at making police officers, alleged to be perpetrators, disappear from the area by way of very quick transfers, so that when the Governor of a State, a person of influence, a retired senior security personnel has interest in a case, it is not difficult for the police to hatch a plan with the Office of the Attorney-General or the Director of Public Prosecutions to frustrate the case of the victim.¹¹⁴⁰

An effective civilian oversight will thus reverse such ugly scenarios, but this has not been the case. The research conducted by Human Rights Watch in the year 2005 in Nigeria revealed that even if people know that the police action was wrong and illegal, those interviewed were often described as feeling utterly powerless to seek redress.¹¹⁴¹ As a result of lack of accountability on the part of the police, the mere presence of the police can cast such a pall of fear that people are willing to make payments just as precautionary measures to be left alone. The power of the police to dominate, threaten, evoke fear and demand bribes is pervasive in environments where no one is policing the police,¹¹⁴² such as in Nigeria.

The fieldwork gathered that, apart from the rights violation by the police, private individuals of means use the police to grossly violate the rights of other hapless people. The fieldwork also gathered that the high handedness in policing has to do with 'police culture' in Nigeria, by which those currently in service pass on to new recruits the usual style of policing.¹¹⁴³ Thus, irrespective of the level of education of the new recruits, they are said to acquire the bad culture because that is what is expected of them, and that anything to the contrary it is said will make such new recruits incur the wrath of their superiors and older colleagues.¹¹⁴⁴

Some of the people interviewed during the field study expressed disgust and ultimate helplessness at the lack of accountability in respect of human rights violations committed by the police and that making complaints to the police authorities is like a

¹¹⁴⁰ Ibid.

¹¹⁴¹ Ibid See Human Rights Watch, *'Rest in Pieces': Police Torture and Deaths in Custody in Nigeria*, Report on research conducted by Human Rights Watch in Nigeria, July 2005 p. 5.

¹¹⁴² See Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 186.

¹¹⁴³ This has been described by another author as the 'Existence of "deviant" but durable "police sub-culture" which moulds the "working personality" of new constables.' See Femi Odekunle, "Overview of Policing in Nigeria: Problems and Suggestions", in Etanbi E.O. Alemika & Innocent C. Chukwuma, (eds) (2004), op. cit. p. 8.

¹¹⁴⁴ Ibid.

second victimization.¹¹⁴⁵ The police have been indicted as the greatest violator of human rights in Nigeria, and the government has not shown enough commitment to address the situation.¹¹⁴⁶ Efforts to reform the police in Nigeria have, to date been largely symbolic and have constantly failed to prioritize human rights issues. A review of the Police Act was initiated in 2004, and it is hoped that laws governing the police will be brought into line with international standards, particularly the inclusion of a code of conduct that specifically prohibits the use of torture.¹¹⁴⁷

In criminal justice administration, the police constitute a major hindrance by causing undue bottlenecks, e.g. not seeking the advice of the Director of Public Prosecutions on time or deliberately neglecting to do so and suspects are left to languish in prison.¹¹⁴⁸ The practice by the Nigerian police of arraigning suspects in court for what is referred to as ‘a holding charge’¹¹⁴⁹ a terminology that can neither be found in the Nigerian Constitution or in any criminal law in the Federation,¹¹⁵⁰ led to a serious problem in the administration of criminal justice, where 40 percent of the inmates awaiting trial in Nigerian prisons were reported to have been held on a holding charge.¹¹⁵¹ This is in spite of the unconstitutionality of this practice as ruled by the Court of Appeal in *Johnson v. Lufadeju*,¹¹⁵² and before this landmark decision, a long line of cases have also held the practice to be unconstitutional,¹¹⁵³ a practice which constitutes an

¹¹⁴⁵ This work gathered from the chief executive of one of the human rights NGOs about the case they were handling, which was that of an accused who was tortured by the police through the ‘crucifixion’ method as a result of which the suspect was bleeding through the nose. The chief executive stated that they had written a total of twelve letters to different hierarchies of the police authority without any response, which led to their having to institute a legal action against the Police Service Commission on the matter.

¹¹⁴⁶ See Human Rights Watch, ‘*Rest in Pieces*’: op. cit. p. 6.

¹¹⁴⁷ Ibid.

¹¹⁴⁸ See The Human Rights Violations Investigations Commission Report, May, 2002 *Synoptic Overview*, pp. 52-53.

¹¹⁴⁹ A holding charge simply put is where the police rush to court on what they refer to as ‘a holding charge’ (when the case is least ripe for hearing, and pending conclusion of proper investigation) and arraign a suspect before a Magistrate Court for an offence which the court does not have jurisdiction to try, under the guise that the matter is still being further investigated and what the Magistrate Court does in most cases is only make an order for the remand of the accused in prison custody, pending the filing of information and arraignment of the accused before the proper court (the High Court), instead of the Magistrate making an order to strike out the matter. After such an order for remand of the suspect has been given, where the police do not succeed in assembling relevant evidence to prosecute the accused, the police throw in the towel and the accused is left to rot away in jail for years.

¹¹⁵⁰ See Report of the National Working Group on Prison Reforms and Decongestion, February, 2005, Federal Republic of Nigeria, Abuja p. 7.

¹¹⁵¹ See The Report of the National Working Group on Prison Reforms and Decongestion, February, op. cit. pp. 6-7 In *Jonathan Faramade & 9 Ors v. Controller of Prisons, Lagos State & 2 Ors.*, [Unreported Suit No. M/505/97]; *Tobi Dahunsi & 12 Ors. V. Controller of Prisons, Lagos State, & 2 Ors.*, [Unreported Suit No. M/607/97]; *Rasaki Ishola & 12 Ors. V. A-G. Lagos State & 2 Ors* [Unreported Suit No. M/37/98], the applicants in the three cases were remanded in prison custody on account of holding charges for periods ranging from two to over ten years respectively, before human rights NGOs came to their aid and secured their release.

¹¹⁵² 2002 N.W.L.R. (Pt.768) p. 192.

¹¹⁵³ Some of these are *Ogor v. Kolawole*, [1985] 6 N.C.L.R. 534; *Enwerem v. C.O.P.*, ([1993] 6 N.W.L.R., (Pt.299) p. 333; *Onagoruwa v. The State*, [1993] 7 N.W.L.R. (Pt. 303) p. 49.

infraction on the detainees' rights to personal liberty and a fair hearing.¹¹⁵⁴ The police also sometimes make it a crime to be unemployed by arresting and charging the hapless poor for spurious offences such "as the offence of 'having no means of livelihood'! etc."¹¹⁵⁵

From the views gathered during the field study, the Commission has not displayed such political will of being capable to discharge such enormous duties placed upon it by the Constitution in its oversight functions. The delegation of its powers to the Inspector General of Police is indicative of this and its lack of ensuring effective oversight over the police. The field study also revealed that the Commission has a shortage of material and limited human resources at its disposal, a situation which was said to make it sometimes depend on the police for resources to perform its own duties. Thus its independence from the police cannot be said to be assured. The Commission was also regarded as being too alienated from the people, as its offices are only located in each State capital and this makes it easily accessible only to the elites and not the general public.

The inefficiency of the Commission and a confirmation of the impunity that still accompanies police corrupt practices and abuses in Nigeria was seen in the case of *Theophilus Uwalaka & 2 Ors v. Police Service Commission*,¹¹⁵⁶ which was instituted in 2005 for an order of *mandamus* to compel the defendant to investigate the allegations of bribery/extortion and other investigative malpractices against some police officers, and for the exercise of disciplinary control over them, consequent upon the failure and/or neglect of the defendant to perform its statutory duties as conferred by law.

The Commission, as done by similar bodies in other countries should be proactive by having an efficient inspectorate unit, which will be responsible for monitoring the activities of the police and not to totally depend on people having to bring their complaints to them, in view of the lack of confidence and distrust the masses usually have for police and government bodies. They should regularly visit police stations to see the number of people detained, for what offences, for how long, their physical condition (if any evidence of torture) and condition of the cells, and other issues on their rights.¹¹⁵⁷

¹¹⁵⁴ See Olisa Aggakoba, SAN and Stanley Ibe (2004), op. cit. pp. 5-51.

¹¹⁵⁵ See Chief Akin Olujimi, SAN, "Keynote Address", in E.E.O. Alemika and I.C. Chukwuma (eds.) (2003), op. cit. p. xxii.

¹¹⁵⁶ Unreported Suit No. FHC/ABJ/M570/2005, Ruling delivered on 11th July, 2006 by Hon. Justice B.O. Kuewumi.

¹¹⁵⁷ Although the police authorities have in the past established platforms such as Police Community Relations Committees (PCRC) and the Police Public Complaints Bureau (PBC), in all states of the Federation, as a way of getting feedback from the public and dealing with the increasing complaints against the police on human rights abuses and other forms of misconduct, but these, especially the Complaints Bureau have died naturally, owing to a lack of effectiveness and loss of confidence by members of the public. A human rights NGO – the Centre for Law Enforcement Education (CLEEN), in 2001 partnered with the police authority and the Police Community Relations Committee (PCRC), to revive the Police Public Complaints Bureau, so as to create a mechanism through which members of the public with genuine complaints can channel such to the police authorities, with confidence that such complaints would be promptly and thoroughly treated. See Danesi Jafar, *Police Complaints*

The Commission should be properly funded to be able to carry out its functions; it should also ensure that policing is done in accordance with the rule of law and democratic tenets. The issue of the Commission's accessibility to the public should be seriously tackled while paying attention to effective targeting of its oversight functions.¹¹⁵⁸

It is equally important for the government to rehabilitate the police and carry out a thorough review of the police training curriculum to include comprehensive training on human rights issues.¹¹⁵⁹ It was gathered during the field study for instance that the police, especially the junior cadres do not have knowledge of basic human rights principles. The pursuit of an effective police reform initiative that leads to an improved rights-based service that protects the interests of poor people through explicit accountability structures has been advocated.¹¹⁶⁰

The Independent Expert on human rights and extreme poverty in her second report also recommended among others, training and awareness-raising for police forces and social workers in human rights in general and in the phenomenon of extreme poverty in particular.¹¹⁶¹ To ensure that the police deal with cases of extreme poverty in a non-repressive way,¹¹⁶² since people living in extreme poverty regularly come into contact with the police in their daily life (through begging, stealing to live, or being homeless in the streets) and that otherwise criminalization can be a very rapid process.¹¹⁶³

During the field study, it was gathered that a human rights NGO – Crime Victims Foundation, was in partnership with the police and launched the Human Rights Desk Project which the then Inspector General of Police inaugurated in June, 2006. The project commenced in Lagos and Enugu as pilot States, with the hope of replicating the same all over the country. The project is aimed at inculcating in the Nigerian police human rights culture and consciousness, and making them sensitive to the rights of the civil populace. Members of the public with human rights complaints against the police can lodge them with the Desk Officers within selected police stations of the pilot States.

This work also discovered that the project is already facing challenges such as office space, vehicles and other logistics problems, such as exposing police officers to further training. The officers handling the desks are too few and are also inefficient; this makes the project not have any real impact or any effect at all.

Bureau: A Mechanism for promoting Police Accountability in Nigeria, The Storey of CLEEN Past, Present & Future, Centre for Law Enforcement Education (CLEEN), December, 2003, pp. 15-16.

¹¹⁵⁸ See Joel Miller, "Civilian Oversight of Policing: Lessons from the Literature", in E.E.O. Alemika and I.C. Chukwuma (eds.) (2003), op. cit. p. 25.

¹¹⁵⁹ This should be well conceptualized and the pedagogy well spelt out, the Nigerian law Faculties can partner with the police authorities and the police colleges to provide the necessary resources for this.

¹¹⁶⁰ See UNDP, Human Development Report 2000, op. cit. p. 100.

¹¹⁶¹ See E/CN.4/2000/52, the second report of the Independent Expert on human rights and extreme poverty, p. 4 para 1.

¹¹⁶² Ibid at p. 32 para 110.

¹¹⁶³ Ibid para 144.

During the field study, some of the people interviewed mostly lawyers and human rights activists suggested that a sure way to protect fundamental rights from police abuses is to make police personally liable when they go beyond the scope of their duties to violate rights. It was also suggested that any police involved in human rights abuse should not be posted from his/her duty post to where the alleged violation was committed, until the matter is fully investigated and the matter disposed of. Those interviewed based the above suggestions on the premise that if police are made answerable for rights abuses they commit, they will become accountable.

There are however other matters that the government should urgently give attention to. This is with respect to the proper funding and equipment of the police. They still keep records manually and use typewriters with ribbons, most patrol vehicles are not functioning and where they are, they are in a sorry state. They have no funds to conduct investigations and even when they get clues they can't analyze them as there is no forensic laboratory, such that police can't investigate crime in a modern way. The police's investigative skills have to be built so that crime can be established based on evidence rather than on confessions. The police should also be adequately trained to collect efficient data, carry out research and policy analysis.¹¹⁶⁴

Unfortunately, a police equipment fund set up by the last civilian administration with the aim of adequately equipping the police is currently enmeshed in a scam involving about \$434 million and is said to have been mismanaged/missing. The National Coordinator of the Police Equipment Foundation (PEF), Mr. Kenny Martins, has been allegedly picked up and questioned by the Police in connection with the scam.¹¹⁶⁵ This is not cheering for the individuals, corporate bodies and other donors, which have made handsome donations to the fund in order to have a properly equipped police force.

The poor conditions of service of the police also have to be looked into as the police are currently poorly remunerated.¹¹⁶⁶ The police officers who spoke to this work expressed the view that there is no effective insurance policy in place for them despite the highly risky nature of their duties and that when a police officer dies on duty, the police authorities don't make immediate arrangement and provisions for burial and prompt payment of entitlements to family of the deceased or to a permanently disabled officer. Money is therefore raised among themselves before provision is made by the authorities. This breeds and sustains the high level of corruption in the police, and poses

¹¹⁶⁴ See DFID, *Safety, Security and Accessible Justice*, July, 2002, p. 56. A Presidential Committee on Police Equipment Fund has been set up with the aim of raising funds to adequately equip the police.

¹¹⁶⁵ See Ise-Oluwa Ige, *N50bn Police Equipment Fund: Court orders Kenny Martin's arrest*, Vanguard, 30 April 2008.

<http://www.vanguardngr.com/index.php?option=com_content&task=view&id=7594&Itemid=42> accessed 18 May 2008; Onwuka Nzeshe and Davidson Iriekpen, *Police arrest Kenny Martins, Okiro: I did not ask him to bribe Keyamo*, This Day, 6 May 2008.

<<http://odili.net/news/source/2008/may/6/214.html>> accessed 18 May 2008.

¹¹⁶⁶ As at the time of the fieldwork, a police constable earns about N10,000 (approx \$75) per month, a sergeant earns N15,000 (approx \$112) while an inspector earns about N22,000 (approx \$165). The salaries of the senior officer was revealed to this work.

serious challenges. A well remunerated and motivated police force will be able to attract the best people, to make it truly professional.

Some of those interviewed during the field study also opined that background and past criminal records of prospective applicants for police jobs should be thoroughly investigated, in order to prevent the recruitment of criminals and bad eggs into the police. Also, they stated that alleged corruptive practices said to be characterizing recruitments into the police should be investigated and decisively tackled.¹¹⁶⁷ Some new recruits have recently been fished out of enlisting into the police through fraudulent means.¹¹⁶⁸ It was suggested that after a comprehensive retraining of the police, its personnel should be re-screened to weed out the bad eggs and those who are not amenable to training; otherwise the police will continue to pose a serious threat to human rights and the administration of justice in Nigeria.

This work also recommends that all international donors and development partners should put a condition on their assistance to the police on its protection and respect for fundamental rights of the citizens. The government must also ensure that police authorities take the issue of police accountability and prompt consideration of complaints by members of the public seriously. The complaints procedure must be efficient and complainants should be able to track how the complaints are being dealt with and erring police officers sanctioned, and all disciplinary measures taken should be publicized, as evidence that action has been taken and to stem impunity. This will go a long way to keep check of the incessant police human rights abuses.¹¹⁶⁹

3.8.4 The Public Complaints Commission (the Ombudsman)

The Public Complaints Commission (hereinafter called ‘the Ombudsman’) was established in Nigeria in 1975.¹¹⁷⁰ The Ombudsman has powers under section 5 of the law to inquire into complaints lodged with it by members of the public (including non-Nigerian residents in the country) pertaining to any administrative action taken by the Federal, State or Local Governments, public institutions and companies, whether in the public or private sectors. The Ombudsman is the only body by law which has investigative power over the courts. The Ombudsman has power to initiate matter *suo moto* and its services are free of charge.

¹¹⁶⁷ See Femi Odekunle, “Overview of Policing in Nigeria: Problems and Suggestions”, in Etanbi E.O. Alemika & Innocent C. Chukwuma, (eds) (2004), op. cit. p. 8.

¹¹⁶⁸ See Olusola Fabiyi, *Why we cheated, forged documents to join the police-45 police recruits*, The Punch, 12 April 2008 <<http://odili.net/news/source/2008/apr/12/400.html>> accessed 15 April 2008.

¹¹⁶⁹ Under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN General Assembly Resolution 40/34 of 29 November 1985, victims of abuses of power are entitled to fair, expeditious, inexpensive and accessible mechanisms of justice and to prompt redress and is provided for by national legislation for the harm suffered. Victims should also be informed of their rights to seek redress through such mechanisms, among other necessary assistance that should be given to the victims. See paras 4, 5 and 6, under the access to justice and fair treatment sub-heading.

¹¹⁷⁰ By Decree No. 31 of 1975 as amended by Decree No. 21 of 1979 The Decree was entrenched in the 1979 Constitution and is now Cap 377 Laws of the Federation 1990.

The Chief Commissioner and the Commissioners are appointed and responsible to the National Assembly. The Ombudsman however cannot handle complaints lodged later than 12 months after the date of the act or thing done from which the complaints arose. The Ombudsman has a total of 72 offices across the country comprising the Headquarters in Abuja, 36 State Offices and 5 Zonal offices.

Prior to the establishment of the National Human Rights Commission, the Ombudsperson dealt with cases of human rights abuses and corruption, but not any longer.¹¹⁷¹ The complaints dealt with by the Ombudsman include cases of wrongful termination of employment, inadequate compensation in respect of acquired land, allegations of extortion by court officials, demand for gratifications, suppression of appeal by judicial officers, fraudulent withholding of retirement benefits, unlawful arrest by the police, abnormal increase in electricity bills, assault and battery against police officers, wrongful accusation and extortion of money by the police, harassment by the police, withholding of recovered money by the police, etc.¹¹⁷²

There are however limitations to the capacity of the Ombudsperson in serving as a channel for the redress of rights violations under the Constitution. In the first place the Ombudsman was established to deal with complaints arising between government departments and the citizens. So it cannot handle complaints between two individuals, although individuals do direct cases of right violations to the Ombudsman but it cannot achieve much because it was set up to resolve cases of maladministration or injustice arising from the action and inaction of the administrative authorities and their agencies. The Ombudsman was not equipped for the task and was not directly involved in human rights work.¹¹⁷³

Another limitation is the fact that section 6(1)(d) of its enabling law excludes the Ombudsman from handling any complaints relating to anything done or purported to be done in respect of any member of the military and police. Although it is stated in the Ombudsman service charter that it can handle military, police or armed forces brutality or misuse of power against the public and evidence of this was reported in its annual reports referred to above, this will be held *ultra vires* if the act of the Ombudsman is challenged legally. It is necessary that its enabling law be amended to enable it take complaints against the police and the military as well, since members of these bodies have been notorious for human rights abuses as noted by the HRVIC.

¹¹⁷¹ Many Ombudsman offices are not directly concerned with human rights, except insofar as these relate to the Ombudsman's main function of overseeing fairness and legality in public administration. However, some more recently created offices have been given specific human rights protection mandates, although the precise classification of a particular institution as a human rights commission or Ombudsman's office is complicated by a significant degree of overlap in the functions and actual work of institutions. See United Nations Centre for Human Rights, *National Human Rights Institutions: a Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, New York and Geneva, 1995 at 4 cited in X, *National Human Rights Institutions: An overview of the Asia Pacific Region*, 7 Int'l J. on Minority & Group Rts. 207 (2000) p. 214.

¹¹⁷² See The Public Complaints Commission Annual Reports for 2004 and 2005.

¹¹⁷³ See Babafemi Akinrinade, *Human rights NGOs in Nigeria: Emergence, governmental reactions and the future*, African Human Rights Law Journal, (2002) 2 AHRLJ, 110-134 at p. 112.

The field study also gathered from those interviewed that public awareness about this body and its activities has waned over the last decade and that it is no longer effective. The fact that the Ombudsman has its offices in each state capital is said to be responsible for its services being inaccessible to the teeming rural poor. It was stated that people at the grassroots lack information on the existence of such bodies and how to access its services and the cost of accessing the services in terms of transportation may be a major obstacle to the poor even if they become aware of such services. They suggested that the Ombudsman should spread to the rural areas or design programmes targeted at reaching the rural poor.

During an interview of the Ombudsman's Director of Investigations, he informed this work that the claims that the body is no longer effective is not true and instead stated that they still receive a lot of complaints¹¹⁷⁴ and that in some cases they have to send complaints to the appropriate institutions for consideration, but admitted that they have not done much in terms of publicity as a result of a cut in the Ombudsperson's annual budgetary allocation from the government, which has incapacitated it from spending on publicity. However, the Director added that the ethos of the Ombudsman internationally does not allow indulgence in too much publicity, so as not to incite too many complaints.¹¹⁷⁵ Although this body is now over 30 years old, awareness of the body is still very low among the general populace as the field study on this work gathered. The Ombudsman is in a good position to check judicial corruption if its activities are publicized.

Other challenges of the Ombudsman include dearth of facility to work, especially vehicles for conducting investigations. This consequently makes it difficult for its officials to conduct investigations and occasions delay in investigations and conclusion of complaints. The law establishing the Ombudsman needs to be amended to review upwards the fines in the sums of N500 (approx \$4) stipulated under offences in sections 8 and 9, which are currently not more than a slap on the wrist.

In some systems, the ombudsperson is empowered to act as plaintiff by referring a case to the appropriate courts. Irrespective of the position, the Ombudsperson is seen as providing the citizen with an additional form not only of expression but also of protection against the acts of an administration whose fields of action has tentacles everywhere and whose workings are often impenetrable. The existence of an ombudsperson and the offer of free services, flexible procedures, more speedy examination and settlement of cases, ordinarily should provide all citizens with a way of access and a new complementary remedy without depriving them of other traditional remedies. The Ombudsperson also provides an alternative avenue for the grievances of

¹¹⁷⁴ The Ombudsman received 14,873 complaints from 1st Jan – 31st Dec 2004, out of which 9,730 were resolved and for the same period in the year 2005 it received 9,407 complaints out which 5,622 were resolved. See Annual Reports for 2004 and 2005. These figures are very low compared to daily complaints that go unreported owing to inaccessibility, lack of confidence in government bodies and awareness.

¹¹⁷⁵ This may be unsuitable for Nigeria's peculiar society with a high illiteracy level, ignorance and many grievances.

the people to be ventilated by an independent body without necessarily having to resort to legal proceedings which are inaccessible, complex, expensive and prolonged.¹¹⁷⁶

This body therefore needs to be made efficient to be able to function effectively and a lot more still needs to be done in terms of creating awareness about the services of the body, for the poor and the vulnerable to be able to access them to enforce their other legal rights.

3.8.5 National Human Rights Commission

The National Human Rights Commission (hereinafter called ‘the Commission’) was established in 1995.¹¹⁷⁷ The Commission was established in 1995,¹¹⁷⁸ during the dark days of the regime of the late military junta Gen. Sanni Abacha in the wake of the hanging of the novelist and environmental rights activist, Ken Saro Wiwa.¹¹⁷⁹ Its mandate is set out under section 5 of the Act to deal with all matters relating to the protection of human rights as guaranteed by the Constitution of Nigeria, the African Charter, the UN Charter and the UDHR and other international treaties on human rights to which Nigeria is a signatory.

The Commission is also to monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendations to the government for the prosecution and such other actions as it may deem expedient in each circumstance, assist victims of human rights violations and seek appropriate redress and remedies on their behalf, undertake studies on all matters relating to human rights and assist the government in the formulation of appropriate policies on the guarantee of human rights, publish regular reports on the state of human rights protection in Nigeria,¹¹⁸⁰ organize local and international seminars, workshops and conferences on human rights issues for public enlightenment, and liaise and cooperate with local and international organizations

¹¹⁷⁶ See Jean-Bernard Marie, “National Systems for the Protection of Human Rights”, in Janusz Symonides (ed) (2003), *Human Rights: International Protection, Monitoring, Enforcement*, Ashgate UNESCO Publishing, pp. 266-267.

¹¹⁷⁷ See The National Human Rights Commission Decree No. 22 of 1995 now Cap 22 Laws of the Federation of Nigeria 2000.

¹¹⁷⁸ The first national human rights commission was set up in Saskatchewan, Canada, in 1947 and since then several countries have established similar commissions. In some other parts of the world the institution of the Ombudsman has been vested with a human rights jurisdiction. The United Nations (UN) has been actively involved for several years in promoting and strengthening independent, effective national human rights institutions. See X, *National Human Rights Institutions*; op. cit. p. 209.

¹¹⁷⁹ Who was the leader of the Movement for the Survival of Ogoni People (MOSOP) an ethnic movement) and eight of his Ogoni kinsmen in order to launder the image of the government at that time and to seek international legitimacy despite its atrocious and abysmal human rights record. This accounted for reasons why the Decree establishing the Commission was signed and back dated to pre date the killings in order to show the world that Nigeria has a Commission on human rights. Hence, the appointment of the Governing Council members was not done until a year later in 1996 and the inauguration of the Council was also not done until after another one year, so from the date of the Act, it took two years to have the Commission on the ground.

¹¹⁸⁰ Generally human rights commissions exercise specific functions directly related to the promotion and protection of human rights. See X, *National Human Rights Institutions*; op. cit. p. 214.

on human rights for the purpose of advancing the promotion and protection of human rights.

The Commission is further empowered by its enabling law to participate in all international activities relating to the promotion and protection of human rights, maintain a library, collect data and disseminate information and materials on human rights generally, and carry out all such other functions as are necessary or expedient for the performance of these functions under the Act. The broad mandate given to the Commission is in accordance with the requirement of the Principles relating to the status and functioning of national human rights institutions (Paris Principles),¹¹⁸¹ which requires that a national institution shall be given as broad a mandate as possible.¹¹⁸² It is however important to state that expansive powers such as those given to the Commission by 'legislation do not ensure the effective functioning of such an institution. In order to evaluate the effectiveness of a national institution, its practical operations must be examined.'¹¹⁸³

The Commission apart from its head office in Abuja has only 5 zonal offices covering the six geo-political zones of the country in Kano, Maiduguri, Jos, Enugu, Lagos and Port-Harcourt, and a staff strength of 338,¹¹⁸⁴ comprising 210 senior staff and 128 junior staff. From 1996 to July, 2006 the Commission received a total number of 3,726 complaints out of which 2,705 were admissible while 1,021 were declared inadmissible. As at July, 2006 a total of 1,307 have been concluded while 1,398 are pending.¹¹⁸⁵

This work gathered from the Commission during the field study and from copies of past programmes made available, that since inception the Commission has organized workshops and seminars on human rights for lower Courts Judges, Police, Prison officials, the Media, law enforcement agencies, national conferences on alternatives to imprisonment, organized in collaboration with human rights NGOs and other stake holders. It has also held lectures for students of tertiary institutions to sensitize youths and inculcate human rights culture in them, and established human rights clubs in

¹¹⁸¹ At the workshop in October 1991 convened by the Centre for Human Rights to review and update information on existing national human rights institutions, with participants including representatives of national institutions, States, the United Nations, its specialized agencies, intergovernmental and non-governmental agencies, in addition to views on existing arrangements, the workshop participants drew up a comprehensive series of recommendations on the role, composition, status and functions of national human rights institutions. These recommendations, which were endorsed by the Commission on Human Rights in March 1992 (Resolution 1992/54 and by General Assembly in its Resolution A/RES/48/134 of 20 December 1993 are now referred to as the Paris Principles <<http://www.unhchr.ch/him/menu/2/fs19.htm>> accessed 29 November 2007.

¹¹⁸² See the Paris Principles para 2.

¹¹⁸³ See X, *National Human Rights Institutions*., op. cit. p. 219.

¹¹⁸⁴ A Commission with only 5 zonal offices and 338 staff is grossly incapable of performing its statutory duties in a country with a population of 140 million, coupled with poor human rights records.

¹¹⁸⁵ See National Human Rights Commission, Statutory Report, presented at the Annual Bar Conference of the Nigeria Bar Association (NBA), Held at Port Harcourt, Nigeria 26 August – 1st September 2006 reported in National Human Rights Commission's Human Rights Newsletter, July-September 2006 Vol. 5 No. 2 p. 26.

secondary schools and tertiary institutions for the purpose of inculcating the norms of human rights in the future generations of Nigerians, among others.

This work was also informed by the Commission during the field study that during the Council meetings of the Commission, which is held from one State to another, Council members usually divide themselves into two groups with one visiting the police stations, while the other visits the prison in that State. At the police station, they find out about the detainees, reasons for their detention, numbers and conditions of detention, and make a report of their findings, which is submitted to the government. The Commission is also said to be involved in a public enlightenment campaign on its activities during Council meetings through the religious and traditional heads in the host communities. These are however few and far between and are held only at State capitals. A regular and rigorous human rights education rather than an *ad hoc* one is required in Nigeria where the majority are poor and illiterate, in order for them to be able to develop rights consciousness which will empower them through enforcement and lift them out of poverty.

The issue of promotion is very fundamental to rights protection because it is when the people are aware of their rights that they can seek to enforce violations and in turn serve as an effective means of a poverty reduction strategy. The Vienna Declaration and Programme of Action,¹¹⁸⁶ reaffirmed: ‘...the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.’¹¹⁸⁷

The Commission’s performance was adjudged too abysmally low on the promotion of rights through public enlightenment as gathered during the field study. Most people interviewed opined that awareness about the Commission and its activities are low. In fact an Attorney-General and Commissioner for Justice in one of the States in Nigeria who was interviewed by this work, stated that he does not hear much about the Commission and that if awareness can be low at his level then one can imagine the very low level of awareness among the general public.¹¹⁸⁸ The Commission is thus not complying with the Paris Principles, with respect to publicizing human rights.

It is recommended that in view of the level of poverty, illiteracy and low level of human rights awareness in Nigeria, the Commission should be able to establish presence in every local government council of the federation, in order for its services to be felt and

¹¹⁸⁶ Adopted by the 1993 World Conference on Human Rights (UN Doc DPI/1394/Rev 1/HR. -The Vienna Declaration and Programme of Action para. 36.

¹¹⁸⁷ See X, *National Human Rights Institutions*;, op. cit. pp. 212-3

¹¹⁸⁸ The awareness about the Commission and its efficiency in Nigeria cannot in any way be matched with other agencies of government, such as those dealing with corruption, the Independent Corrupt Practices Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC) and the one dealing with fake and adulterated drugs, National Agency for Food and Drugs, Administration Council (NAFDAC), which are household names in Nigeria. Two of the agencies, EFCC and NAFDAC are particularly known for their efficiency and consistent public awareness campaigns.

to entrench the culture of human rights at the grassroots.¹¹⁸⁹ The Australian Commission for instance is easily accessible¹¹⁹⁰ to the people as complaints can be lodged at various locations and it also promotes accessibility by being flexible in its operations by sending conciliators to remote locations, and there is significant publicity and information available.¹¹⁹¹

The Commission should also make conscious efforts to report the human rights situation generally in Nigeria and in each State, including the Federal Capital Territory in its annual report. This is a requirement of the Paris Principles and also part of its mandate.¹¹⁹² The Commission should also take the initiative for the convocation of national conferences from time to time, where all the stakeholders can discuss ways of effectively promoting and protecting human rights.¹¹⁹³

With the high level of human rights abuses in Nigeria which is acknowledged both nationally and internationally, it is contradictory that since 1996 to July, 2006 a period of about a decade, the Commission received a total number of 3,726 complaints out of which 2,705 were admissible. This clearly attests to the very low public awareness, inaccessibility and inefficiency of the Commission, as gathered during the field study. The UN Handbook on National Human Rights Institutions enjoins that a complaints mechanism should be accessible, rapid and inexpensive, among others.¹¹⁹⁴

In its mandate of seeking redress on behalf of victims it must be stated that from 1996 to 2006, it was gathered during the field study that neither has the Commission instituted any human rights based litigation in a bid to assist a victim nor has it undertaken an intervention in court proceedings on human rights. While it may not be mandatory for the Commission to litigate for redress, this becomes necessary in strategic matters in order to protect rights and to set a precedent.

The Indian Commission for instance can recommend prosecution by government if a violation was perpetrated by a public servant and can also approach the Indian Supreme Court or the High Court for directions as to writs, and can recommend interim relief for the victims and families.¹¹⁹⁵ It might therefore be necessary for the laws establishing the

¹¹⁸⁹ A way to achieve this given the resource constraints is for the Commission to partner with each local government to provide office space and furniture for the Commission's use while welfare officers at the local government level will be trained to carry out human rights protection and enlightenment activities.

¹¹⁹⁰ The UN Handbook on National Human Rights Institutions suggests that a complaints mechanism should be accessible, rapid and inexpensive, and should have clearly defined and legally entrenched procedures. See X, *National Human Rights Institutions*., op cit. p. 266.

¹¹⁹¹ See The International Role of the Human Rights and Equal Opportunity Commission, cited in X, *National Human Rights Institutions*., op. cit. p. 232.

¹¹⁹² Which in paragraph 3(iii) provides that national institutions shall have the responsibilities of the preparation of reports on the national situation with regards to human rights in general and on more specific matters.

¹¹⁹³ Stakeholders such as the police, prison service, human rights NGOs, the judiciary, justice ministries, Bar Association and the academia among others.

¹¹⁹⁴ See X, *National Human Rights Institutions*., op cit p. 266.

¹¹⁹⁵ See X, *National Human Rights Institutions*., op. cit. p. 246.

Commission to be amended to empower it to be able to compel the violator to make good the clear and unambiguous damages suffered by the plaintiff by way of compensation without victims having to necessarily resort to court.

The Commission should also be able to handle conciliation and mediation for parties in appropriate cases because a common function of human rights commissions is their capacity to receive and investigate complaints from individuals alleging human rights abuses in violation of national law. Many human rights commissions rely on processes of conciliation and arbitration.¹¹⁹⁶ Based on this, commissions are not usually granted authority to impose legally binding outcomes on parties to a complaint. In some cases however, a special tribunal may hear and determine issues outstanding from an unresolved complaint. In the alternative, commissions may be able to transfer outstanding complaints to the regular courts for a final and binding determination.¹¹⁹⁷

The Commission currently has no power to hear complaints or petition directly and thus cannot perform any arbitration or conciliation duties. It is necessary for the Commission to be empowered to perform conciliation and arbitration duties, and when agreement is reached, the Commission should be able to enforce its terms, which should be binding on the parties. When mediation/conciliation is unsuccessful, the Commission should be able to refer the matter to a board of inquiry or board of adjudication which holds a public hearing in which witnesses are heard under oath and the parties may be represented by counsel.

However, the great challenge currently facing the Commission in its investigating duties is that of not having the power to compel witnesses, access documents or enter premises, which are vital to investigation, yet the law establishing the Commission says it has power to investigate all human rights abuses and seek redress on behalf of victims. This is a serious handicap in view of the unwillingness of rights violators to respond to allegations without the power to compel their attendance. Investigative powers are of little utility without the capacity to provide remedies for violations. Powers of national human rights institutions in relation to remedies vary widely. Some have power to impose penalties or refer a matter to a higher body. Others are limited to recommendations to Parliament or government agencies for further action.¹¹⁹⁸

The power to make binding orders can strengthen the authority of a national human rights institution. Some national institutions are empowered to make legally enforceable orders and binding decisions. Generally, this allows the institution to refer the matter to a higher body in the event of non-compliance.¹¹⁹⁹

Funding is a major challenge as this work gathered from the Commission, and that this is seriously impacting on its efficiency, as current capital votes only meets administrative costs with barely anything left to carry out its mandate. Also there are

¹¹⁹⁶ Ibid. p. 214.

¹¹⁹⁷ Ibid.

¹¹⁹⁸ See X, *National Human Rights Institutions*., op. cit. p. 270.

¹¹⁹⁹ Ibid.

infrastructural problems: for instance, there are acute shortages of facilities to work with, e.g. office equipment like computers, office furniture, vehicles etc. - there are only two vehicles for investigation at the head office which are already old, while out of all the 5 zonal offices, only Port Harcourt has a vehicle, which was recently provided in October, 2006. These negative factors have combined to make the task of protecting and investigating human rights abuses a monumental one for the Commission.

This work was also informed that the Commission's staff lacks the required capacity in writing human rights reports, hence it is in arrears in the writing of its own reports. Although it was said that the UNDP has given limited institutional capacity development support to the Commission and local partners for effective advocacy, monitoring and reporting violations, as well as defending the rights of citizens.¹²⁰⁰ It is thus crucial that the Commission should build capacity in this crucial area.

There has been genuine concern about the Commission's independence in order for it to effectively promote and protect human rights, being a body set up by the government. This is borne out of the fact that except for the Commission being truly independent, it may lack the bite to properly challenge the actions of the government and its agencies usually noted as the main human rights violators. Independence of the Commission is also central to its mandate of drawing the attention of the government to the situation of human rights in the country, in accordance with the Paris Principles.¹²⁰¹ This was the expected role said to be performing which was believed to have led to the removal of the former Executive Secretary of the Commission in 2006.¹²⁰²

¹²⁰⁰ UNDP is also providing training and technical assistance to increase knowledge and observance of human rights by security agents, increase public awareness of the rights of citizens, and improve counselling and legal services for women.
<<http://www.ng.undp.org/modules.php?name=News&file=article&sid=13>> accessed 26 July 2007

¹²⁰¹ See Para 3(a)(iv).

¹²⁰² In June 2006, Alhaji Bukhari Bello former Executive Secretary of the Nigerian National Human Rights Commission (NHRC), and also the Chairperson of the Co-ordinating Committee of African National Human Rights Institutions, was dismissed four years before the expiry of his contract, for what was widely believed to be the result of his comments in defence of human rights and for his critical approach to the human rights policy of the Nigerian government. He was alleged to have criticized the repression of the media by security agencies, which he called "an infringement on the freedom of expression and the rule of law". In his role as Chairperson of the Co-ordinating Committee of African National Human Rights Institutions he was said to have also spoken out on international human rights issues, including criticizing African political leaders for procuring to unconstitutionally prolong political mandates, which could have been read as a direct criticism of former President Obasanjo and his quest for a third term and a statement questioning the legality of the US detention centre in Guantanamo Bay, Cuba. <<http://web.amnesty.org/library/Index/ENGAFR440122006?open>> accessed 16 January 2007; the former Executive Secretary also berated the legislature for not making appropriate laws to bring life to the social economic rights in Chapter II of the 1999 Constitution and also faulted the implementation of the National Poverty Eradication Programme (NAPEP), pointing out that political patronage remained their bane. See John-Abba Ogbodo, *Commission flays govt on human rights abuses*, The Guardian, Dec 20, 2005 <<http://odili.net/news/source/2005/dec/20/11.html>> accessed 20 November 2005. For these reasons, he was believed to have been removed by the government.

The removal of the Commission's former Executive Secretary was believed to be a direct expression of the government's intolerant attitude for a bold Commission that can reprove it or challenge its human rights record, especially by an arm created by it. This act was a clear indication of the government's unpreparedness to guarantee the Commissions' independence. This may be partly responsible for the Commission being starved of funds, and the government's neglect/refusal to adequately fund the Commission in breach of the Paris Principles.¹²⁰³ This is because adequate funding can to a large extent guarantee its independence.

In terms of composition of the governing council of the Commission, although the spread of membership satisfies the Paris Principles on pluralism, the Principles provide in paragraph 1(e) under the same heading that representatives of government departments should participate in deliberations in an advisory capacity, so it was wrong for the government to be appointing the Executive Secretary, who is the Chief Executive of the Commission from the Ministry of Justice, as this is currently undermining its independence and performance. The Paris Principles in order to insulate the office and tenure of members provides that members should have a stable mandate defined by law, without which there will be no real independence.

The law establishing the Commission, in section 7 while it provides for a tenure of five years each for the Executive Secretary, subject to re-appointment for a maximum of another term, the former Executive Secretary was however removed before the completion of his term of office. This was a clear violation of the Paris Principles.

Even when the Nigerian human rights community was to hold a meeting at Abuja in June 2006 immediately following the dismissal of the former Executive Secretary of Commission, in order to discuss the dismissal and issues concerning the independence of the Commission, security operatives prevented them from holding a meeting on the grounds of not having obtained a police permit. This action of the government is also contrary to the UN Declaration on Human Rights Defenders, which in Article 5, provides that "everyone has the right, individually and in association with others, at the national and international levels: a) to meet or assemble peacefully; b) to form, join and participate in non-governmental organizations, associations or groups."

The government's intimidation of the human rights community and interference with the independence of the Commission will no doubt hamper an independent scrutiny of the domestic human rights situation aimed at effecting a change in policies and practices of the government. The government's act also runs contrary to the commitment made by Nigeria before being elected in May 2006 into the new United Nations Human Rights Council when it pledged to "continue to promote and protect human rights at home by strengthening and actively supporting the work of the National Human Rights Commission, and others".¹²⁰⁴

¹²⁰³ See Paragraph 2 of the Paris Principles, on adequate funding in order to ensure independence of the Commission and guarantee of independence and pluralism.

¹²⁰⁴ Titled 'Human Rights Council: Nigeria's Voluntary Pledges and Commitments' <<http://www.un.org/ga/60/elect/hrc/nigeria.pdf>> accessed 16 May 2007.

It is the submission of this work that the Commission as it is currently constituted is an executive body. This must have made the Commission to be adjudged as ‘too weak and lacks the will to speak out clearly against abuses or investigate complaints effectively.’¹²⁰⁵ It should therefore be reformed and made to report to the legislature (as required under the Paris Principles) instead of reporting to the Federal Attorney-General and Minister for Justice, who is part of the executive. The Commission should also develop indicators which should be followed at all levels of government and other national institutions or bodies, and publish annual reports stating those that are human rights compliant and those that are not. It should develop an up to date database on issues relating to human rights, advise the government on international instruments obligations and be a one stop shop on human rights issues in Nigeria. The Commission should be strengthened, well funded and made independent by ensuring its funds are drawn directly from consolidated funds.

There is need to reposition the Commission to be able to effectively protect rights and be responsive to victims of rights violation, and be assertive to gain public confidence. Staff should be insured against risk in the investigation of rights violations, as it was gathered during the field study, that staff are sometimes assaulted during investigations. The law establishing it should be reviewed to provide for offences relating to assaulting and obstructing its officials in the course of performing their duties, with stiff penalties imposed for such acts. It should be reasoned that if the officials of the Commission are not safe in investigating rights violations how then can they effectively protect the same and/or assist victims? They should also be properly trained to carry out the mandate of the Commission.¹²⁰⁶ The Commission should however do more to ‘effectively mobilize the people especially at the grassroots, through opinion leaders, community and religious leaders, about their rights and how to remedy infringement.’¹²⁰⁷

3.8.6 Informal measures of accessing justice in Nigeria

The problem of lack of access to justice formally and other easily accessible avenues for rights redress has led to the establishment of informal mediation mechanisms for redressing injustice or rights violations, through programmes designed to take

¹²⁰⁵ See O.V.C Okeme and G.A. Okpara, op. cit. pp. 189 -190.

¹²⁰⁶ Although the amendment Bill of the Commission currently before the National Assembly since 2006 is expected to address some of these defects and lapses when passed into law, this should be given priority by the legislature. These are to strengthen the Commission and guarantee its independence, grant it power of access to all the information that it requires to deal with complaints of human rights violations, power to issue subpoenas for the production of documents and to summon witnesses and parties before it, funding of the Commission to be under the consolidated Revenue Fund, Express empowering the Commission to resolve matters through arbitration, negotiation, mediation and litigation as the last result, making express provision for the Commission’s independence and autonomy, making it compulsory that inquiries or correspondence on human rights matters emanating from the Commission must be responded to within a stated time frame, power to enforce decisions of the governing council on complaints/cases treated, and entrenching the Commission in the Constitution. See Statutory Report: National Human Rights Commission, Human Rights Newsletter, National Human Rights Commission (NHRC), July – Sept., 2006 vol. 5 No.2 p. 28.

¹²⁰⁷ See Vinodh Jaichand, op. cit. p. 133.

complaints from the general public, especially the poor and less privileged. Although these programmes are not on human rights violations *per se*, they are all encompassing. In Nigeria for instance, there is a television programme tagged '*Palava Dey*' (Meaning literally, 'there is grievance') aired every week on one of the federal television stations, in Lagos. There is also, a similar programme on the Lagos State television programme, named '*Gboro mi ro*', (meaning literally, 'look into my complaint' or 'hear my case'). The Ogun State television programme also airs one called '*Olowogbogboro*' (meaning literally, 'the mighty one look into my case').¹²⁰⁸

There are similar television and radio programmes meant to mediate in disputes concerning members of the public in other states of the federation. These programmes usually have a panel of between five and seven members; one of them is usually a lawyer (who expounds and guides the panel on issues of law), and others are drawn from different sections of the society, while the anchor of the programme is a staff member of the television/radio station or a freelance broadcaster. The members of the panel render their services gratis and members of the public who bring their matters to such forum are not charged any fee for accessing mediation. The programmes are either broadcast live or pre-recorded and aired immediately after. Members of the public with complaints or grievances attend these programmes and they are called in turn to the table to state their case, and after preliminary questions are asked by members of the panel as to the nature of the complaints, the anchor person will then announce the name of the party, whom the case is being made against, inviting him or her to attend the next programme at a certain date and time in order to present his own side of the matter.

If the party turns up at the next programme, he or she is called to state his/her own side of the matter and the panel mediates in the dispute and tries to resolve it. However, if a party is recalcitrant or an agreement cannot be reached, they are advised to seek redress in the law courts. These programmes have some measure of effectiveness because the other party usually turns up in a bid to redeem his image and correct the impression which the complainant might have created in the public opinion, when the case was first lodged against him.

The case of one Mr. Ajibola Fasakin, a 65 year old man is illustrative here. His nephews and nieces accused him of appropriating their late father's land. He became sad as a result of the negative publicity the matter had given him when it was first mentioned. The man was reported to have said, "The mere mention of my name on TV has brought shame to me in the neighbourhood where I live. People now take me for a crook. I have lost face. Imagine". The man was said to have been highly embarrassed by "a group of youths shouting 'gboromiro nreti baba o' (meaning 'the television justice programme (i.e. gboromiro) is awaiting you) when he passed through the neighbourhood three days after the accusation was made on television."¹²⁰⁹

¹²⁰⁸ See Inter Press Service, Nigeria-Media: Television Justice, 28 July 1995 (Remi Oyo- author) <<http://www.highbeam.com/doc/1P1-6232070.html>> accessed 6 May 2007.

¹²⁰⁹ Ibid.

These have recorded a measure of success and are relevant to the poor because they are free of charge and the poor are thus able to access justice without payment of fees or having to engage the services of a lawyer, and there are no formal procedures to be followed in accessing it.¹²¹⁰ There are no technicalities involved and parties either communicate in local languages or in *pidgin* English (an adapted version of the English language). They are effective too, as matters are resolved without prolonging the issues. For these reasons, these fora are commonly referred to as the 'peoples' courts'.

However, the programmes are purely media justice designed to bring succour to the poor. They are involuntary media mediation centres and agreements brokered by them cannot be enforced; more so, such programmes have no legal foundation and this sometimes results in parties summoned not turning up and they have no power to compel attendance. This in fact encourages parties summoned not to appear before the panel, especially if he/she is an elite or to backpedal on an agreement reached at the panel with the complainant/accuser.

During the field study, it was gathered that in the villages, people still lodge complaints with either the family head or the community head, but these people do not have knowledge of human rights, such that they often resolve matters which involve infringement of rights in the traditional way, in the way it accords to their sense of fairness and justice.¹²¹¹ These informal platforms for resolving disputes which sometimes involve violation of rights are not based on human rights norms.¹²¹² The work saw the need to train family and community heads in the rudiments of human rights and how to go about redressing the infringement of such rights according to human rights standards. The field study also gathered that religious people still prefer to settle their matters with the religious heads, irrespective of whether the issue involved is a breach of human rights or not. It will also be necessary to carry the religious leaders along in the rights crusade, so that the poor can ultimately benefit.

Based on the problems of lack of access by the poor to the formal legal system, it has been suggested that informal justice¹²¹³ be integrated into the formal legal system as a

¹²¹⁰ See Ola Agbaje, *Some lawyers prefer adjournments to judgments*, Daily Sun, 28 July 2004 <<http://www.sunnewsonline.com/webpages/features/managinglawfirm/2004/july/28/managinglaw-july28-002.htm>> accessed 15 July 2007.

¹²¹¹ In the *Voices of the Poor*, the example of settling village quarrels and conflicts by the *mukhia* (village head) joined by four other village members to form an informal committee called a Panch informal justice systems within poor communities was said to have developed as a response to the lack of law and order, was given. But neither of these mechanisms for dispensing justice was to be ideal. See Narayan, Deepa et al. (2000), *Voices of the Poor: Can Anyone Hear Us?*, op. cit. p. 186 this is a replica of the situation in most communities in Nigeria, where the village and family heads still dispense justice in their own way, owing mainly to the lack of access to formal justice mechanisms by the poor.

¹²¹² See the UK's Department for International Development (DFID) (2000), *Realising human rights for the poor people: Strategies for achieving the international development targets*, p. 17 (pdf). Available at <<http://www.dfid.gov.uk/pubs/files/tsphuman.pdf>> accessed 20 November 2005.

¹²¹³ Informal justice system means a dispute resolution mechanism falling outside the scope of the formal justice system. See Ewa Wojkowska (2006), op. cit. p. 5.

result of its continued relevance in the lives of the poor.¹²¹⁴ Although it was acknowledged that such informal system may not be appropriate to deal with technical criminal law issues,¹²¹⁵ there is need to identify elements of the informal system that are compatible and could be adapted to the formal legal system.¹²¹⁶ This is however not to say that improving the efficiency of the formal justice institutions¹²¹⁷ and enhancing the rule of law is less important, but the usual slow pace of reforms on this has necessitated calls for paying attention to the informal justice system.¹²¹⁸

However, the informal justice systems also have their own deficiencies and may far from realize the ideal, as the systems discriminate against women and disadvantaged groups, they are susceptible to elite's control, the quality of the justice is often dependent on the skills and moral values of the individual operator and they do not always observe international human rights standards.¹²¹⁹

3.9 Summary

Judging from the consideration of measures outlined above to facilitate the poor's equal right of access to justice in Nigeria though commendable, it can hardly be said that such measures are adequate. For example, the equality to fair hearing provision in Article 10 of the UDHR cannot be said to have been adequately met by the government's inability to provide free legal assistance to the indigent in both civil and criminal matters as revealed above and under Guideline 13. Consequently, it has been described as a mockery to secure a pauper solemn constitutional guarantee for a fair hearing and yet one would be required to secure the services of his own lawyer when he cannot afford one.¹²²⁰

The requirement of filing and other administrative fees as condition for filing matters in court, lack of legal assistance for the poor and the limiting of the *in forma pauperis* proceedings to criminal matters constitute both obstacles to the poor's free access to courts, equality before the court and offends the principle of equality of arms in accessing justice.¹²²¹ The principle of equality of arms has been interpreted to imply that each party in proceedings must be afforded a reasonable opportunity to present his case

¹²¹⁴ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 263. The poor and disadvantaged have been said to be infrequent users of the formal justice system. See Ewa Wojkowska (2006), op. cit. p. 5.

¹²¹⁵ Ibid.

¹²¹⁶ Ibid at pp. 263-264.

¹²¹⁷ See Ewa Wojkowska (2006), op. cit. p. 5.

¹²¹⁸ This includes the civil and criminal justice, the formal state-based justice institutions and procedures, such as police, prosecution, courts and custodial measures. See Ewa Wojkowska (2006), op. cit. p. 5.

¹²¹⁹ Ibid at p. 6.

¹²²⁰ See The Supreme Court of Wisconsin in *Carpenter v Dane County* 9 Wis 274, 276 and 277 (1859), cited by Black J in *Betts v Brady* 316 US 455 (1942) at 476, in Budlender, Geoff, op. cit. p. 345.

¹²²¹ See Article 14 of ICCPR and Guideline 13 of Draft Guidelines on Human Rights Approach to Poverty Reduction Strategies.

– including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.¹²²²

From the above numerous challenges militating against the poor in accessing justice to enforce and/or protect their fundamental rights, and in view of the inadequate measures currently to deal with them, this work will address the conceptualization of an equal and effective right of access by the poor to justice as a viable poverty reduction strategy, in the next chapter.

¹²²² See Budlender, Geoff, op. cit. p. 344. The principle of equality of arms has now been regarded as another element in assessing whether a hearing is fair. The litmus test whether a party to civil proceedings can be said to have a fair hearing has also been predicated on some other conditions, which based on consideration of the cases emanating from various jurisdiction includes the following: - the consequences of the case for the party concerned; the complexity of the issues; the ability of the party to represent himself or herself effectively; the risk of error if a party is not represented; and possible 'inequality of arms' if the other party is likely to be represented.

CHAPTER 4

ARTICULATION OF MECHANISMS FOR ENHANCING EFFECTIVE ACCESS TO JUSTICE FOR THE POOR AND HUMAN RIGHTS EDUCATION

4.1 CONCEPTUALIZATION OF THE RIGHT OF EQUAL AND EFFECTIVE ACCESS TO JUSTICE BY THE POOR

The adjectival nature in terms of enforcement is the most important element in ensuring respect for rights, on the basis that it is one thing to have the rights entrenched in the Constitution or other instruments, but it is another to make provisions for their operation. More importantly, the rights might be provided for and the procedure might be well provided for, but notwithstanding merit, the person affected might still not be able to access justice, because he/she has no means of seeking the ladder that leads to the Temple of Justice.¹²²³

In spite of the robustness of the substantive laws in respect of human rights, there has been little emphasis on the importance of adjectival laws by means of which the rights can be enforced. At the international level, apart from an emphasis on the right of equal access to justice and effective remedies, especially the Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies, which recognizes that the right of equal access to justice is one of the rights to be addressed in poverty reduction strategies in the human rights approach.¹²²⁴

However, details of what should constitute models in adjectival laws in order to guarantee easy and equal access to justice especially for the poor, in enforcing human rights remains hazy and sketchy. Although 'one of the principles of the rule of law is premised on equality before the law, which is also an important feature of international human rights law, and even provided in the Constitutions of many countries including Nigeria, but all (especially the poor) have not equal opportunity to access justice or remedies provided by the law.'¹²²⁵ In Nigeria, although the Constitution neither knows nor tolerates class among the citizens, and in respect of civil rights, all citizens are deemed equal before the law, but in practice, the humblest is not the peer of the most powerful.¹²²⁶

Access to justice is consistent with accountability in a human rights approach based on international human rights law, as it will serve as an important vehicle of bringing to account, rights violators and makers of policy which result in people's poverty, and

¹²²³ See Hon. Justice Kayode Eso (1990), op. cit. p. 14.

¹²²⁴ See Guideline 13 especially para 199.

¹²²⁵ Ibid p. 15.

¹²²⁶ See the highly applauded powerful dissent of Justice John Marshall Harlan in the landmark old civil rights case of *Plessy v. Ferguson*, 163 U.S. 537 (1896) and the highly applauded powerful dissent of Justice John Marshall Harlan in the landmark old civil rights case, where the majority rule upheld segregation.

which sustains or aggravates them.¹²²⁷ Since justice is out of the reach of the poor in most cases, they are excluded from society and placed in illegal situations in their own country, feeling utterly helpless about police actions or other social services they can't access.¹²²⁸ These situations also have greater impact in the lives of the poor since it is difficult for them to obtain redress, affect their range of human rights and make them to fall deeper into poverty.¹²²⁹

If the poor are able to access and enjoy the different components of the international human rights normative framework that can contribute to their empowerment and poverty reduction,¹²³⁰ and can enforce those rights, this will greatly contribute to poverty reduction.¹²³¹ Also, the sacred pledges and sublime commitments to the ideals of fundamental rights contained in the Nigerian Constitution will have a hollow ring unless the fundamental rights which they bestow upon every citizen are buttressed by an efficient legal remedy.¹²³²

Under the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, Guideline 13, access to court is conceived as an important avenue for the poor to defend themselves against human rights violations,¹²³³ which the poor are vulnerable to but acknowledged the fact that owing to economic or other reasons poor people lack the capability to obtain court protection.¹²³⁴ Access to justice has also been acknowledged as important 'for human development, establishing democratic governance, reducing poverty and conflict prevention.'¹²³⁵ Based on this realization, Guideline 13 outlined the scope of equal access to justice as poverty reduction measures.¹²³⁶ The scope of which focuses on the following:¹²³⁷

¹²²⁷ See Office of the UN High Commissioner for Human Rights

<<http://www.unhchr.ch/development/povertyfinal.html>> accessed 12 February 2007.

¹²²⁸ See E/CN.4/1999/48 report of the Independent Expert on human rights and extreme poverty, p. 31 para 118.

¹²²⁹ See Ewa Wojkowska (2006), op. cit. p. 8.

¹²³⁰ For instance the concept of accountability (policy makers or other actors), the principles of equality and non-discrimination, equality and participation, and the recognition of the interdependence of rights (i.e. the equal relevance of civil and political and economic social and cultural rights to poverty reduction).

¹²³¹ See The Office of the High Commissioner for Human Rights, Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water, A Background Paper on the World Summit on Sustainable Development Johannesburg, 26 August – 4 September, 2002, p. 4-6. An Expert Seminar called in 2001 on Human Rights and Extreme Poverty shares this view when it stated among others that, '...poor people experienced violations of a large range of rights, all of which would - if they were respected or fulfilled - contribute to moving them out of poverty'. See E/CN.4/2001/54/Add.1 Report of the Expert Seminar on Human Rights and Extreme Poverty, para 20.

¹²³² This was stated by Hon. Justice Oputa, making reference to the dictum of *Diplock, L.J., in Jaundoo v. Attorney-General of Guyana* [1971] AC (PC) 972 at p. 978. See Hon. Justice Chukwudifu Akune Oputa (1989), op. cit. p. 50.

¹²³³ See Lucie Lamarche, op. cit. p. 7.

¹²³⁴ See Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies, Guideline 13 para 184 and 192.

¹²³⁵ See Ewa Wojkowska (2006), op. cit. p. 5.

¹²³⁶ Ibid para 194.

¹²³⁷ Ibid.

- i.) Equal right of all persons before the courts and tribunals and to enjoy certain procedural guarantees in civil and criminal trials.
- ii) Equality before the courts is interpreted to mean that all persons must be granted, without discrimination, a right of equal access to an independent and impartial court or tribunal for the determination of civil disputes or criminal charges.
- iii.) The most important procedural guarantee in both civil and criminal proceedings is stated to be the right to a fair and public hearing, including the principle of equality of arms between all parties.

Within the context of the above international human rights provisions, there is an obligation on Nigeria to put in place, an effective framework, administrative and/or judicial to protect people's fundamental rights, and enable the poor to have equal and effective access to justice in enforcing their rights, thus creating a leeway for them to combat the challenges that militate against their escaping the cycle of poverty. This is in view of the fact that Nigeria's judicial system and other avenues of accessing justice as noted above are deficient and grossly inadequate, as in some other countries;¹²³⁸ thus the focus of this work is to propose appropriate mechanism(s) for realizing equal and effective means of access to justice for the poor.

The challenge of which mechanism is appropriate and whether a single mechanism or a combination of mechanisms should be focused on in this regard is monumental, in view of the multidimensional nature of poverty;¹²³⁹ also a single mechanism may not be a one size fits all affair. The different views of justice and of the best fora for achieving it for instance, has led to suggestions of the possibility of divergent approaches to legal policies concerned both with access and mediation.¹²⁴⁰

Towards the above, this work advocates a two-tier mode of accessing justice in order to provide:

- i.) Free and equal access to justice for the poor, whereby all their rights can be enforced.
- ii.) Enablement of the people to have alternatives to enforce their rights.
- iii.) Wide, effective and non-rigid means of access to justice.

Since there is nothing that prohibits a national system from having a dual or even multiple models of accessing justice, as this will further empower the people through the choices the people can make,¹²⁴¹ the following are thus focused on as mechanisms which are inter-linked for the purpose of providing equal and effective access to justice for the poor in Nigeria:

- i.) Adoption of the Indian model of public interest litigation (with modification)
- ii.) Introduction of an alternative dispute resolution mechanism (ADR)

¹²³⁸ See UNDP, Human Development Report 2000, op. cit. p. 37.

¹²³⁹ Ibid.

¹²⁴⁰ See McEwen, Craig A.; Williams, Laura, *Legal Policy and Access to Justice Through Courts and Mediation*, Ohio St. J. on Disp. Resol. 865 (1997-1998), p. 866.

¹²⁴¹ See Budlender, Geoff, op. cit. p. 356.

There should also be a strong emphasis on the component of human rights education as a means of empowering and enhancing access of the poor who are often illiterates, to justice.

These issues will now be treated *seriatim* as follows:

4.2 Public Interest Litigation (PIL) as a viable mechanism for ensuring an equal and effective right of access to justice for the poor

Litigation ideally should not necessarily be the first option in redressing human rights violations, especially in the light of the fact that access to courts is almost impossible to most vulnerable groups in terms of procedure and costs.¹²⁴² It is nonetheless necessary to approach courts to clarify what the contents of the rights are, in order to advance human rights.¹²⁴³ This is because rights without remedies are of little value.¹²⁴⁴ It has been stated for example that to possess a right of free speech or movement is of little value if there is no corresponding legal means to vindicate it when others obstruct it, and that legal means includes both access to courts and skilled representation in court.¹²⁴⁵

Access to courts to all individuals is deemed essential to protection of rights based on the argument that the legislature and the executive cannot be entrusted with the enforcement of rights,¹²⁴⁶ since only the judiciary can be relied on for protection,¹²⁴⁷ and in view of the courts' pivotal roles in protecting rights.¹²⁴⁸ Also, the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, Guideline 13 advocated among others, improving the poor's physical access to courts as a means of empowering the poor.¹²⁴⁹

Exploring litigation is based on the absence of a conceptual framework for human rights litigation procedure tailored to suit the poor and vulnerable.¹²⁵⁰ 'The latter is more in

¹²⁴² See on South Africa, V. Govender, "Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options" in B.K. Goldewijk, A.C. Baspineiro and P.C. Carbonari (ed.) (2002), *Dignity and Human Rights. The Implementation of Economic, Social and Cultural Rights*, Antwerp, Intersentia, 79: cited in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 137.

¹²⁴³ See Vinodh Jaichand, op. cit. p. 127.

¹²⁴⁴ See Budlender, Geoff, op. cit. p. 345.

¹²⁴⁵ Ibid.

¹²⁴⁶ See D. LUBAN, *Lawyers and Justice: An Ethical Study*, 254 (Princeton, Princeton University Press 1988, cited in Pankratz, Jeffrey R., op. cit. p. 1104 The author buttressed this assertion by stating that the American republican system was justified primarily by the argument that the legislature and executive cannot be entrusted with the enforcement of rights.

¹²⁴⁷ See Pankratz, Jeffrey R., op. cit. 1104.

¹²⁴⁸ See A. Hamilton, *The Federalist* No. 78, cited in Pankratz, Jeffrey R., op. cit. 1104.

¹²⁴⁹ See para 199.

¹²⁵⁰ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 137.

tune with the general shift from norm-setting to effective protection.¹²⁵¹ Importantly, 'success in courts goes a long way to bring about positively assertive attitude because the marginalized, vulnerable and indigent have grown accustomed to defeat on a regular basis.'¹²⁵² Law also has been regarded as often a daunting and befuddling business, which never seems to see things from the view of the marginalized, vulnerable or indigent person, and that most people have a feeling that the law is on their side when courts pronounce in their favour which reinforces their belief that human rights are a tangible reality.¹²⁵³

In view of the challenges facing the poor in accessing justice through the courts as already noted above, there is need for some sort of flexible mechanism to make access to court/justice easy and meaningful for the poor.¹²⁵⁴ In view of the peculiar problems confronting the poor in accessing justice in terms of illiteracy, ignorance and complex court procedure, 'there is need for total liberalisation of procedural rules as deduced from the very instructive experience of pro-poor human rights litigation, termed Social Action Litigation (SAL)¹²⁵⁵ in India.'¹²⁵⁶

The unique way of India seeking a new judicial approach to the poor and the disadvantaged as regards access to justice, took cognizance of the need to lower the seal for poor people.¹²⁵⁷ There is particular need to make human rights relevant to real life situations of the people especially at national level, by strengthening existing human rights mechanisms.¹²⁵⁸ Accessibility to the courts on equal terms is essential to equality before the law. Failure to provide this foundational protection through the courts, most of the time rests on promises of liberty and justice for all which remains a mockery for the poor and the oppressed, as equal access to the judicial process is the *sine qua non* of a just society.¹²⁵⁹

More often than not, the poor do not have the opportunity of taking their complaints before regional or UN human rights body, both in terms of the technicalities, the cost and time factors, among others. It is thus important to place more emphasis at the

¹²⁵¹ Ibid.

¹²⁵² See Vinodh Jaichand, op. cit. p. 128.

¹²⁵³ Ibid.

¹²⁵⁴ The issue of access to courts in enforcing fundamental rights was realized in New Zealand by the Justice and Law Reform Select Committee, which stated in 'its interim report on the Bill of Rights White Paper that unless the Bill of Rights provided some guarantees of assistance in gaining access to the courts, it would be "irrelevant to the mass of people within this society who do not enjoy the 'right of access to justice' at the present time".' See Richardson, Ivor, op. cit. p. 164, the interim report as cited by the author is Justice and Law Reform Select Committee Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper, A Bill of Rights for New Zealand (Government Printer, Wellington, 1986).

¹²⁵⁵ In this work, the words 'Social Action Litigation (SAL)' and 'Public Interest Litigation (PIL)' are taken to mean the same thing, except where otherwise indicated and may be used interchangeably.

¹²⁵⁶ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 137.

¹²⁵⁷ See Hon Justice Chuckwudifu Akunne Oputa (1989), op. cit. pp. 83-84.

¹²⁵⁸ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 138.

¹²⁵⁹ See Weinstein, Jack B., op. cit. p. 655.

national level, by developing pro-poor litigation measures to ensure that the poor have access to justice at the national level, more than anything else. This is more so, as the national level remains the focal point of making human rights relevant especially for the poor people in developing countries of the world.¹²⁶⁰

The Public Interest Litigation (hereinafter referred to as 'PIL') in the Indian model is being proposed based on the following:

- 1.) PIL has been used in India to make justice more accessible to the poor and deprived sections of the community¹²⁶¹ by pulling down access and procedural barriers.
- 2.) In India, PIL has been used to advance human rights, especially for being adapted to suit the poor and vulnerable groups,¹²⁶² notwithstanding its weaknesses and limitations.¹²⁶³
- 3.) PIL 'has transcended the experimental stage and has developed into a comprehensive doctrine which has been studied in the country of origin and abroad,'¹²⁶⁴ and thus has a lot to offer as a model for Nigeria subject to fine-tuning as may be required.
- 4.) PIL involves a novel judicial approach to the poor and the disadvantaged as regards access to justice that took cognizance of the need to lower the seal for the poor.¹²⁶⁵
- 5.) The Indian experience of the poor lacking access to justice that led to PIL is very similar to the Nigerian situation.¹²⁶⁶

4.2.1 Background of PIL in India

In general terms, "PIL" has been defined as 'a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or

¹²⁶⁰ Ibid.

¹²⁶¹ See Sujana Singh, *Public Interest Litigation-Is it an Overact of Judiciary?*, Amritsar Law Journal, Vol. VII (1998) p. 156.

¹²⁶² For example, public interest litigation cases - in education and the environment - have been used to secure people's economic and social rights in India, notwithstanding the fact that such rights are not justiciable in that country. See UNDP, Human Development Report 2000, op. cit. p. 5.

¹²⁶³ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 143.

¹²⁶⁴ Ibid.

¹²⁶⁵ See Hon Justice Chuckwudifu Akunne Oputa (1989), op. cit. pp. 83-84.

¹²⁶⁶ In *Bandhua Mukti Morcha V. Union of India*, (AIR 1984 S.C. 802; 1984 SCC (3) 161) per Pathak, J., the Supreme Court of India stated 'In our country, this new class of litigation is justified by its protagonists on the basis generally of vast areas in our population of illiteracy and poverty, of social and economic backwardness, and of an insufficient awareness and appreciation of individual and collective rights. These handicaps have denied millions of our countrymen access to justice.' Making reference to a similar situation, the Supreme Court of Nigeria in *Ariori v. Elemo* (1983) 1 S.C.N.L.R 1 stated per Eso JSC, that 'The courts in this country, especially this court, being a court of last resort have a duty to safeguard fundamental rights. The reason of the learned Justice in that case was 'Having regard to the nascence of our Constitution, the comparable educational backwardness, the socio-economic and cultural background of the people of this country and the reliance that is being placed and necessarily has to be placed as a result of this background on the courts, and finally, the general atmosphere in the country.' See Hon. Eso, op cit p. 213.

liabilities are affected.”¹²⁶⁷ However, the PIL as practised in India has been described as a doctrine of procedural relaxations in cases of human rights violations, in order to make both access to justice and furnishing of proof easier.¹²⁶⁸ Furthermore, PIL has equally been described as ‘both an enforcement and implementation strategy, aiming at implementation of fundamental rights in the Indian Constitution, first and foremost for the weakest and most vulnerable groups in the society.’¹²⁶⁹

The development of PIL in India has been ascribed to the Emergency period from 1975 to 1977.¹²⁷⁰ The emergency state which was declared by the government of India Gandhi on 25 June 1975 followed a growing criticism of electoral fraud. The state of emergency led to suspension of the enforcement of fundamental rights and Article 19 (freedom of expression) of the Indian Constitution, and the federal government expanded its powers to the detriment of the states.¹²⁷¹ The Emergency period, which was in force between 26 June 1975 and 21 March 1977, was declared by the President pursuant to Article 352 of the Indian Constitution, on the advice of the Prime Minister Indira Ghandhi. The period witnessed monumental violations of fundamental rights with the enactment of the Maintenance of Internal Security Act, and suspension of basic fundamental rights.¹²⁷²

The judicial response to the petitions challenging the gales of rights violations, in particularly arbitrary detentions and the validity of the laws were very disappointing.¹²⁷³ Also, prior to the Emergency period, the Supreme Court of India had been allegedly marginalized both by the legislature and executive, as a result of which it had not been able to safeguard the fundamental rights of the people.¹²⁷⁴ This made the role of the judiciary to come under criticism for which the judiciary sought to ‘make amends’ and correct its perception in the public opinion, through the PIL.¹²⁷⁵

At the end of the emergency period, there was political repositioning despite which the elected government was weak and trying to consolidate.¹²⁷⁶ The government was fast losing ground and by 1978/79, the government was collapsing, which was the period

¹²⁶⁷ See Black’s Law Dictionary cited in Vinodh Jaichand, op. cit. p. 127.

¹²⁶⁸ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 144.

¹²⁶⁹ Ibid.

¹²⁷⁰ Ibid.

¹²⁷¹ See Gobind Das, *Supreme Court in Quest of Identity*, Lucknow, Eastern Book Company, 1987, 85-86 cited in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 144.

¹²⁷² See Ashok H. Desai and S. Muralidhar, “Public Interest Litigation: Potentials and Problems”, in B.H. Kirpal et al. (eds) (2001), op. cit. p. 9.; S. Muralidhar, “Judicial Enforcement of Economic and Social Rights: The Indian Scenario”, in Fons Coomans (ed.) (2006), op. cit. p. 240.

¹²⁷³ See S. Muralidhar, “Judicial Enforcement of Economic and Social Rights: The Indian Scenario”, in Fons Coomans (ed.) (2006), op. cit. p. 240.

¹²⁷⁴ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 145.

¹²⁷⁵ See S. Muralidhar, “Judicial Enforcement of Economic and Social Rights: The Indian Scenario”, in Fons Coomans (ed.) (2006), op. cit. p. 240.

¹²⁷⁶ Ibid.

when the PIL movement was initiated by the judiciary.¹²⁷⁷ PIL in India is primarily judge-led and even to some extent judge-induced; the product of juristic and judicial activism of the Supreme Court.¹²⁷⁸ At the Indian Supreme Court, PIL was developed by the Justice Krishna Iyer and Justice Bhagwati, but it reached its peak during the tenure of Justice Bhagwati as Chief Justice.¹²⁷⁹ The Supreme Court has developed the innovative strategy of PIL for the purpose of making basic human rights meaningful for the large masses of people in the country and making it possible for them to realize their ESC rights to a large extent.¹²⁸⁰

The origin of the concept in India can also be linked to the Directive Principles of the Indian Constitution, which the Supreme Court of India viewed as encapsulating the ESC rights of the people and hold out social justice as the central feature of the new constitutional order. This basic Constitutional mandate reportedly motivated and inspired some of the justices to become social activists.¹²⁸¹ The justices were said to have realized that in the early years of its existence the instrumental use of formalist jurisprudence made by the Supreme Court had benefited only the advantaged classes and had given an impression of the Supreme Court acting as a roadblock in the way of progress.¹²⁸²

Also the Indian judiciary felt that it had not done much to meet the constitutional dreams of large sections of the underprivileged populace during the first three decades of independence,¹²⁸³ based on the country's legal structure designed for a colonial administration and jurisprudence tailored on a free market economy. PIL therefore represents sustained efforts of the Indian apex Court to provide access to justice for the deprived sections of the Indian community.¹²⁸⁴ The PIL was thus conceived by the judiciary as a means to providing solutions to the problems precipitated by 'the formal legal system in providing access to justice'.¹²⁸⁵

With the apex court's realization of having shortchanged the masses, this pushed the justices into action, presenting new ideas, opening new possibilities, and starting to assert and to exercise, almost explosively, judicial power in aid of the disadvantaged, breaking rank from the old tradition and embarking upon unorthodox and unconventional strategies for bringing justice to the poor. This brought into existence PIL with its characteristic of social justice dimension.¹²⁸⁶ It was with a view to make

¹²⁷⁷ Ibid.

¹²⁷⁸ See Bhagwati, P.N., *Judicial Activism and Public Interest Litigation*, 23 Colum. J. Transnat'l L. 561 (1984 – 1985) p. 561.

¹²⁷⁹ Ibid.

¹²⁸⁰ See Bhagwati, P.N., op. cit. p. 567.

¹²⁸¹ See Bhagwati, P.N., op. cit. p. 568.

¹²⁸² Ibid pp. 568-9.

¹²⁸³ That is from political independence of India in 1947 to 1977 which represented 30 years, till the commencement of PIL around 1978/79.

¹²⁸⁴ See Bhagwati, P.N., op. cit. p. 568.

¹²⁸⁵ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 241.

¹²⁸⁶ See Bhagwati, P.N., op. cit. p. 569.

itself (i.e. the apex court in India) more accessible to disadvantaged sections of society that contributed to the birth of the phenomenon of PIL.¹²⁸⁷

PIL in India has been likened to that in America. While others have argued that PIL is basically a reproduction of American PIL,¹²⁸⁸ PIL India has been described as an improved version of the U.S. PIL.¹²⁸⁹ The primary focus of PIL in the U.S. is on civic participation in governmental decision-making, and it seeks to represent "interests without groups," such as consumerism and environmentalism.¹²⁹⁰ The main rationale for PIL in the U.S. has been given as that of ensuring that citizens do participate in the formulation of policy that will affect them.¹²⁹¹

Although the American version of PIL has grown to be used 'to vindicate important commonly shared rights in such areas as civil liberties and civil rights, administrative regulation, tax assessments, and municipal affairs', apart from being used 'to ensure more meaningful and democratic participation in the governmental decision-making process and check governmental abuses, etc.'¹²⁹² The U.S. model which developed in the late 1960s is also used for underrepresented minority interests, disadvantaged groups and a variety of other issues,¹²⁹³ but is noted for and has made great contributions in the areas of consumer protection and environmental issues.¹²⁹⁴ It is also well respected and known to provide public interest legal services in the areas of civil and welfare rights.¹²⁹⁵

¹²⁸⁷ See Sujan Singh, op. cit. p. 156.

¹²⁸⁸ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 189.

¹²⁸⁹ See Jasper Vikas Gorge, Social Change and Public Interest Litigation India, <<http://india.indymedia.org/en/2005/03/210205.shtml>> accessed 6 May 2007.

¹²⁹⁰ See Bhagwati, P.N., op. cit. p. 569.

¹²⁹¹ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 190.

¹²⁹² See Myers, Robert M., *Standing in Public Interest Litigation: Removing the Procedural Barriers*, 15 Loy. L.A.L. Rev. 1 (1981 -1982) p. 1.

¹²⁹³ Although mainly used for underrepresented minority interests, disadvantaged groups and a variety of other issues, by the 1900s it came to be used to improve the working conditions of women and children, in challenging business practices, to protect consumers and in environmental cases. It was later used in the policy areas, i.e. to preserve the constitutionality of protective legislation, such as that dealing with maximum working hours and minimum wage. By 1976 a survey revealed that the core of matters litigated by most public interest law firms (which were funded mainly by private sources, especially by major grants from the Ford Foundation and later with other private foundations) were consumer and environmental protection, political reform and mental health. Later, enforcement of civil rights for the poor, employment discrimination, policy issues directed at legal reforms such as environmental regulation and legislation dealing with maximum working hours and minimum wage were also accommodated. See Karen O'Connor and Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Laws*, 7 Harv. J.L. & Pub. Pol'y 483 (1984) pp. 483-485, 489, 493-494, 495; Joel F. Handler, Ellen Jane Hollingsworth, Howard E. Erlanger, and Jack Ladinsky, *The Public Interest Activities of Private Lawyers*, 61 A.B.A. J., 1388 (1975), p. 1.

¹²⁹⁴ See Karen O'Connor and Lee Epstein, op. cit. p. 499; see Mauro Cappelletti, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, 25. Buff. L. Rev. 643 (1975-1976) p. 670.

¹²⁹⁵ See Mauro Cappelletti, op. cit. p. 670.

However, the issues taken up by PIL in India are much wider than that of PIL in the United States.¹²⁹⁶

Under the U.S. model, two types of litigation are cognizable on the one hand: those directed at legal reform and those which are mainly used in environmental and consumer cases, and on the other, those purporting to provide legal services to the poor and the neglected groups.¹²⁹⁷ The U.S. model also presents two types of action, class action or representative action and public interest action. In a class action, a class suitor, who is a self-appointed representative of a class acts for the general benefit of that class.¹²⁹⁸ In such a case, all group members are bound by the judicial decision if the representation is fair and adequate,¹²⁹⁹ while a public interest action purports to protect interest of the public or a portion of it.¹³⁰⁰

The model of PIL that has evolved in the United States has been said to have distinctive characteristics peculiar to its social context and environment, and as such it is not a model that can be transplanted to developing countries like India because of large scale poverty and ignorance and the lack of adequate resources.¹³⁰¹ This reason accounts for why the Indian model is more appealing to this work as a result of the large scale poverty and ignorance in Nigeria. It is however important to state that the PIL in America has distinctive features similar to the PIL in India in the sense that it also promotes justice by affording a viable remedy for plaintiffs with small individual claims who otherwise could not economically pursue their rights.¹³⁰² Also, the U.S. PIL is used as a device to mitigate the seeming civil justice failure¹³⁰³ and (class action) as a tool to equalize the parties in litigation.¹³⁰⁴ These are some of the aims of the Indian PIL.

4.2.2 Main features of public interest litigation in India

The Indian model of PIL witnessed an innovative use of judicial power¹³⁰⁵ and represents a classic example of the courts becoming directly involved in solving the problem of legal services to the poor through their court rules.¹³⁰⁶ Apart from many

¹²⁹⁶ See Bhagwati, P.N., op. cit. p. 569. The issues covered under PIL in India include bonded labour, police torture and brutality, matrimonial, environmental, neglected children, food and drugs adulteration, family pension, forest and wildlife, culture, antiques, etc.

¹²⁹⁷ See J. Handler, "Public Interest Law Firms in the United States", in M. Cappelletti and B. Garth (ed.) (1979), *Access to Justice III Emerging Issues and Perspectives*, Sijthoff, Alphen aan den Rijn, p. 423, cited in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 190.

¹²⁹⁸ See Mauro Cappelletti, op. cit. p. 699.

¹²⁹⁹ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. 190.

¹³⁰⁰ Ibid.

¹³⁰¹ See Bhagwati, P.N., op. cit. p. 569.

¹³⁰² See Jerold S. Solovy et al, op. cit. cited in Gensler, Steven S., op. cit. p. 291.

¹³⁰³ See Marshal J. Rabiteau, *Abusive Class Actions: An Expanding Growth Industry*, 2001 WL 1505996 (N.L.C.P.I.), NLCPI-B-0901 p. 2.

¹³⁰⁴ See Mauro Cappelletti, op. cit. p. 644.

¹³⁰⁵ See Bhagwati, P.N., op. cit. p. 572.

¹³⁰⁶ See D'Alemberte, Talbot, op. cit. 108.

procedural liberalizations, it was also held for instance that the State is under a constitutional obligation to see that there is no violation of the fundamental rights of any person, particularly when he belongs to the weaker sections of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him.¹³⁰⁷ PIL in India can thus be described as a platform for vindicating the poor's rights, with its unique characteristics as follows:

- i.) Liberalization of rules of standing
- ii.) Relaxation of procedural requirements of access
- iii.) Appointment of Commissioners for the purpose of gathering evidence and the non-adversarial nature of PIL
- iv.) Innovative reliefs/remedies
- v.) Court's supervision of its own orders

These features will now be treated *seriatim* as follows:

4.2.2.1 Liberalization of rules of standing

The apex Court in India realized that 'The Court for a long time had remained the preserve of the rich and the well-to-do, and had been used only for the purpose of protecting the rights of the privileged classes',¹³⁰⁸ and the poor were thus priced out of the judicial system, for they were unable to approach the courts for justice.¹³⁰⁹ However, the Supreme Court of India found that the major impediment which deprived the poor and the disadvantaged of effective access to justice was the traditional rule of standing, which insists that only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal rights or legally protected interests can bring an action for judicial redress and no other person can file an action to vindicate such a right.¹³¹⁰

Customarily the right to engage in litigation is limited to those who can be said to have *locus standi* in *judicio* and the court assumes jurisdiction to adjudicate on it when it is satisfied that a party approaching it has *locus standi* in the matter.¹³¹¹ *Locus standi* is

¹³⁰⁷ See *Bandhua Mukti Morcha V. Union of India*, (AIR 1984 S.C. 802; 1984 SCC (3) 161 para 3.

¹³⁰⁸ See Bhagwati, P.N., op. cit. p. 571; in the history documenting the workings of the early Supreme Court in Lagos Nigeria, during the colonial period, it was stated that male, propertied and western-educated people were over-represented among those initiating cases, while poor, illiterates and women sometimes brought suits. See Thomas Spear, "Section Introduction: New Approaches to Documentary Sources, in Sources and Methods" in Toyin Falola and Christian Jennings (eds) (2003), *African History: Spoken, Written, Unearthed*, University of Rochester Press, Rochester, pp. 169 and 204. The same domination by the rich and the elites of litigation in Nigeria still continues to date.

¹³⁰⁹ See Bhagwati, P.N., op. cit. p. 570.

¹³¹⁰ Ibid at pp. 570-1.

¹³¹¹ *Locus standi* is required of both parties. As can be seen from the following passage: 'In the case of both plaintiff and defendant, it is necessary that they should have a *locus standi in judicio*, that is, a capacity to appear before the law, such as is not possessed by all those who are not their own men, like children under seven years, and insane persons, who cannot appear any way, even when supported by their tutors.', see Hedendaegse Rechtsgeleerdheid 4.15.39 (Gane's translation) 4 4.14.17 cited in Beck, Andrew, *Locus Standi in Judicio or Ubi lus Ibi Remedium*, 100 S. African L. J. 278 (1983) p. 278.

thus primarily only accorded to those with sufficient interest in the subject matter of the suit, that is, those who have some real or immediate interest or concern in the subject of the litigation.¹³¹²

The rule of standing which evolved in private law litigation to deal with a right-duty pattern was found to have effectively barred the doors of the Court to large masses of people in India who, on account of poverty and ignorance, could not access the judicial process.¹³¹³ It was reasoned that the poor would not be able to utilize the judicial process even if a legal aid programme was provided for them as a result of their being ignorant of their constitutional and legal rights, and that even if they were made aware of their rights, many of them would lack the required capacity to assert those rights.¹³¹⁴

In view of the above, the Indian Supreme Court therefore decided to depart from the traditional rule of standing and broadened access to justice,¹³¹⁵ by declaring that the rules governing *locus standi*, developed by Anglo-Saxon jurisprudence, are manifestly uncongenial to the social and cultural setting of India.¹³¹⁶ Starting with the *locus classicus* decision in *S.P. Gupta v. Union of India*,¹³¹⁷ popularly known as the Judges' Transfer case, the *locus standi* of citizens to institute public interest cases before the Supreme Court was upheld. It became firmly established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of their constitutional or legal rights, and such person or determinate class of persons is by reason of poverty or disability in a socially or economically disadvantaged position and unable to approach the Court for relief, any member of the public or a social action group acting *bona fide* can maintain an application in a High Court or the Supreme Court seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.¹³¹⁸

The doctrine of standing was thus enlarged in India to provide wide access to justice to a large section of the poor community for whom it has been a matter of despair when accessing justice.¹³¹⁹ The court thus realized the need to depart from the rules for the poor.¹³²⁰ The strict rule of *locus standi* therefore became relaxed in two ways: i.) representative standing, and ii.) citizen standing.¹³²¹ Representative standing occurs in situations where a person is by reason of poverty or disability in a socially or economically disadvantaged position and unable to approach the Court for relief, a third party is allowed to prosecute the matter on his behalf. This relaxation is however subject to qualifications that such a member of the public acting in public interest must act *bona*

¹³¹² See Butt, A. F., *For Whom the Bell Tolls*, 93 S. African L.J. 128 (1976) p. 128.

¹³¹³ See Bhagwati, P.N., op. cit. p. 571.

¹³¹⁴ Ibid.

¹³¹⁵ Ibid.

¹³¹⁶ See Peirisp, G. L., *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 Int'l Comp. L.Q. 66 (1991) p. 68.

¹³¹⁷ 1981 Supp SCC 87; AIR 1982 SC 149.

¹³¹⁸ See Bhagwati, P.N., op. cit. p. 571.

¹³¹⁹ See *Bandhua Mukti Morcha Vs Union of India* (supra).

¹³²⁰ See Sujjan Singh, op. cit. p. 157.

¹³²¹ See *D.C. Wadhwa v. State of Bihar*, AIR 1987 S.C. 579.

fide with a view to vindicate the cause of justice, and as such must not be acting for personal gain or private profit or other oblique consideration.¹³²²

Citizen's standing is also granted to any member of the public with sufficient interest to maintain an action for redress of a public wrong or injury caused by an act or omission of the State or a public authority which is contrary to either the Constitution or the law.¹³²³

The reason for this relaxation has been premised on possible use of such standing to police the corridors of power and for the prevention of violations of law, as it was viewed that the traditional scheme of litigation as merely a two-party affair was inadequate to deal with situations of injury to an indeterminate class of persons, especially in the field of ESC rights, as no individual rights correspond to the socio-economic duties of the State under the Indian Constitution.¹³²⁴

In *Bandhua Mukti Morcha v. Union of India*,¹³²⁵ the Supreme Court of India indicated that the relaxation of the rules of standing does not mean that access to the court is now without restraint whatsoever, and it was stated that the court would not, in exercise of its discretion intervene at the instance of a meddlesome interloper or busybody. Also the court in that case held that if a person whose fundamental right is violated does not wish to seek judicial redress by moving the court, someone else would not be allowed to do so on his behalf.

The rules of *locus standi* have equally been liberalized in many other common law countries.¹³²⁶ In England, the earlier requirement was that only "a person aggrieved"

¹³²² See *S.P. Gupta v. Union of India* (supra).

¹³²³ Ibid. Some of the human rights activists interviewed during the fieldwork were of the opinion that the court is insensitive by using the issue of *locus standi* to debar them from coming to the aid of members of the public, and that government is also exploiting the situation as a cover not to be called upon to account. They argue that public interest litigation is a veritable means of making the government and their agencies accountable, and as a means of deploying constructive argument for democracy and good governance.

¹³²⁴ Ibid at pp 190 -192 ss 18 and 19 cited in Wouter Vandenhole, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 150-151.

¹³²⁵ Ibid.

¹³²⁶ In the Bangladesh case of *Dr. Mohinddin Farooque v. Bangladesh & Ors.*, [2002] 2 C.H.R. 569 *locus standi* was granted to the plaintiff who was the Secretary-General of the Bangladesh Environmental Lawyers Association (BELA) to maintain an action, on the grounds that associations have a right to protect the common good. In South Africa, Seychelles and Uganda for instance, a person other than the person whose right has been or is likely to be contravened can enforce such rights on that person's behalf. See The Constitution of the Federal Republic of South Africa 1996, section 38; Constitution of the Republic of Seychelles, 1993 (as amended by Act No 14 of 1996) section 46(2); Constitution of the Republic of the Republic of Uganda, 1195 section 50(2). These Constitutions grants a robust *locus standi* to all, to enforce the right of others, including anyone acting in the public interest. This is in tandem with the spirit of the African sense of 'being your brother's keeper'. See the South African case of *Permanent Secretary, Department of Welfare, Eastern Cape and Another v. Ngxuzo and Others* [2001] (4) SA 1184 (SCA), on a human rights-based class action. See Loots, Cheryl, *Keeping Locus Standi in Chains*, 3 S. Afr. J. on Hum. Rts. 66 (1987) pp. 66-68 on the liberalized attitude displayed by the Appellate Division towards *locus standi* in *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A) and canvassing a liberalization of *locus standi* especially in public interest cases.

could move the court for a prerogative writ, but later it was changed to enable a person with substantial interest to move the court.¹³²⁷ Recently in 2001, the African Commission on Human and Peoples' Rights adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa in which it recommended under Section E on *locus standi*, that States through the adoption of national legislation in respect to human rights violations, which are of public concern, any individual, group of individuals or non-governmental organization to be entitled to bring an issue before judicial bodies for determination. This is to facilitate both access to justice and also to protect human rights, as it sought to deemphasize locus standing with respect to redress of human rights violations.

However in Nigeria,¹³²⁸ the rules of standing are still strictly applied, as earlier indicated in this work, with the result that the poor and the socially disadvantaged are still precluded from accessing the hallowed temple of justice to vindicate their rights.

The reason for the position in Nigeria of the courts' adherence to strict application of the doctrine of standing as earlier referred to in this work,¹³²⁹ is based on the apex court's phobia for opening a floodgate of litigation. On the other hand, an activist judge in Nigeria, formerly at the apex court has advocated granting wide access to court in constitutional issues, indicating that surely there will be a floodgate and that 'In constitutional matters: if that is what it imports, let there be a floodgate',¹³³⁰ an advocacy which has not been heeded by the courts in Nigeria to date. However, in *Ozekhome v. The President*,¹³³¹ the court in a rare move gave standing to a legal practitioner to sue on behalf of his clients who were being detained without trial by the then military government and this decision was highly commended as an attempt to advance PIL, although the decision in that case was by a High Court and therefore cannot serve as precedent.

It could therefore be argued that the Nigerian courts' continued strict application of *locus standi* rules have not displayed a better understanding of the peculiarity of the society where poverty, illiteracy and cultural prejudices are pronounced, and that these handicap the people's capacity to enforce their rights. This is what has been done in India through PIL, where the apex court has innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom

¹³²⁷ See S.P. Sathe, Judicial Enforcement of Socio-Economic and Cultural Rights, being paper presented at the First South Asian Regional Colloquium on Access to Justice, New Delhi, 1-3 November 2002, p. 2 <http://www.humanrightsinitiative.org/jc/papers/jc_2002/background_papers/sathe.pdf> accessed 30 July 2007.

¹³²⁸ The legal system in Nigeria is primarily based on English common law, with customary law and Sharia law applied in particular disputes. Section 6 of the Constitution of the Federal Republic of Nigeria 1999 vests the judicial power in the courts created by the Constitution.

¹³²⁹ See *Adesanya v. President of Nigeria* (supra); *Fawehinmi v. Akilu*, (supra); *Fawehinmi v. Akilu* (No.2), (supra); *Theophilus Uwalaka & 2 Ors v. Police Service Commission*, (supra).

¹³³⁰ See *Bendel State v. The Federation*, (1981) 10 S.C. 1 at 190-1 per Kayode J.S.C.

¹³³¹ [2002] 1 NPILR 345.

freedom and liberty have no meaning.¹³³² This is making human rights truly ‘human’ by granting other people the legal right to defend the rights of fellow human beings.¹³³³

It has been rightly argued that the guiding principle of interpreting the Constitution which gave rise to the rights of individual capable of enforcement in a court of law as laid down in the United Kingdom’s case of *Minister of Home Affairs v. Fisher*,¹³³⁴ is a construction that will give full recognition and effect to those fundamental rights and freedoms.¹³³⁵ This to a larger extent is still not the position in Nigeria in view of the existing procedural strangulation. The Indian model of PIL is thus instructive for Nigeria. It has been suggested that in view of the unsettled judicial position on *locus standi* in Nigeria, a better way to resolve the inconsistencies and put the debate to rest is through constitutional amendment to section 6(6) of the Nigerian Constitution in order to grant more access to the court.¹³³⁶

There have been suggestions however, by some of the judges of the apex court in India, that the application of rules of *locus standi* be limited to three situations: i) When the courts are apprised of a gross violation of fundamental rights by a group or class; ii.) When basic human rights are invaded; iii.) When there are complaints of such acts as shock the judicial conscience, for remedying the hardships and miseries of the needy, the underdog and the neglected.¹³³⁷ Another author has equally proposed a model which is to be limited to group and collective complaints.¹³³⁸

The above suggestions to confine PIL to groups alone may amount to an attempt ‘to create a two-tiered system of justice that would effectively consign the poor to a second-rate forum for adjudicating their just grievances.’¹³³⁹ Although representative adjudication may relieve both courts and parties from having to litigate the same issues repeatedly,¹³⁴⁰ it is nothing more than is predicated on judicial economy and efficiency.¹³⁴¹ It has however been argued against judicial efficiency that ‘once we realize how unworthy the battle... against the poor as potential litigants really is, we

¹³³² See *Bandhua Mukti Morcha v. Union of India*, (1984) 2 SCR 67: AIR 1984 SC 802.

¹³³³ See Katarina Tomasevski, Sanctions and Human Rights, in Janusz Symonides (ed.), Ashgate Publishing Ltd. 2003 p. 316.

¹³³⁴ (P.C.) (190) A.C. 319 at 339 per Lord Wilberforce.

¹³³⁵ See Hon. Kayode Eso, op. cit. p. 57.

¹³³⁶ Ibid at p. 109.

¹³³⁷ See *Shri Sachidanand Panley v. The State of West Bengal*, S.C. (1) 11 February 1987, (*Ramsharan Autyanuprasi v. Union of India*, PIL-SCALE, p. 1858, s 60; S.C. (1) 14 November 1988, *Malik Brothers v. Narendra Dadhich* PIL-SCALE, p. 114, s 15; S.C. (1) 25 August 1999, PIL-SCALE V, p. 199. s. 2 cited in Wouter Vandenhoe, Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p.151.

¹³³⁸ In his proposed model for human rights litigation for the poor tagged ‘Integrated Human Rights Social Action Litigation (IHRSA)’ , social action litigation is to be limited to group complaints and collective complaints. See Wouter Vandenhoe, op. cit. Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. pp. 178 and 195.

¹³³⁹ See Weinstein, Jack B., op. cit. 657.

¹³⁴⁰ See Gensler, Steven S., Civil Procedure: Class Certification and the Predominance Requirement under Oklahoma Section 2023 (B) (3), 56 Okla. L. Rev. 289 (2003) p. 289.

¹³⁴¹ See Jerold S. Solovy et al., Moore’s Federal Practice s. 23.44 (3rd ed. 2002) cited in Gensler, Steven S., op cit p. 289.

might forget about sham arguments of efficiency, we might stop shunning off the poor and we could begin to face...central goal: to make certain that every person, rich or poor, can-and knows that he or she can-obtain every right of due process.’¹³⁴² In this regard, PIL should continue to grant access to both individuals and groups.

4.2.2.2 Relaxation of procedural requirements of access

One of the unique features of PIL in India that is related to the relaxation of the rules of standing is in terms of the procedural requirement of access to court through formal writ petition¹³⁴³ or other appropriate proceedings for the purpose of moving the Supreme Court under Article 32 of the Indian Constitution for redressing any breach of fundamental right.¹³⁴⁴ The apex Court realized ‘that one of the main problems which impeded the development of effective use of the law and the judicial system by the disadvantaged was the problem of accessibility to justice.’¹³⁴⁵ The court thus dispensed with formal writs drawn in legal language¹³⁴⁶ despite the fact that there are formal rules for the filing of petitions.¹³⁴⁷

The practice of entertaining simple letters complaining of a legal injury to the author or to some other person or groups as petitions was initiated informally and followed on an *ad hoc* basis by some of the judges of the Indian apex Court, and on which basis relief was granted to large numbers of persons belonging to the exploited sectors of the people.¹³⁴⁸ The practice of accepting letters as petitions is said to have been motivated by the practice in *habeas corpus* cases, where the court acts on letters to grant instant relief to someone being incarcerated.¹³⁴⁹

The treating of ordinary letters, telegrams or even a post card¹³⁵⁰ as a petition however became institutionalized by the Supreme Court in the Judges Appointment & Transfer case of *S.P. Gupta v. Union of India*, decided in December 1981.¹³⁵¹ The Court consequently held in *S.P. Gupta’s case*¹³⁵² and a host of other cases¹³⁵³ that procedure

¹³⁴² See Weinstein, Jack B., op. cit. 660.

¹³⁴³ At common law for instance, a person claiming the writ of *mandamus* had to show that he was enforcing his own personal right. See Ashok H. Desai and S. Muralidhar, “Public Interest Litigation: Potentials and Problems”, in B.H. Kirpal et al. (eds) (2001), op. cit. p. 3 note 20.

¹³⁴⁴ Article 32(1) of the Indian Constitution provides that ‘The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.’

¹³⁴⁵ See Bhagwati, P.N., op. cit. p. 570.

¹³⁴⁶ See S. Muralidhar, “Judicial Enforcement of Economic and Social Rights: The Indian Scenario”, in Fons Coomans (ed.) (2006), op. cit. p. 241.

¹³⁴⁷ See Sandra Fredman (2008), *Human Rights Transformed: positive rights and positive duties*, Oxford University Press Inc., New York p. 127.

¹³⁴⁸ Ibid at p. 572.

¹³⁴⁹ Ibid.

¹³⁵⁰ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p.152; Bhagwati, P.N., op. cit. p. 570.

¹³⁵¹ Ibid. See also Bhagwati, P.N., op. cit. p. 572.

¹³⁵² Ibid.

¹³⁵³ See *People’s Union for Democratic Rights v. Union of India*, (1983) 1 SC 1473; and *Bandhua Mukti Morcha v. Union of India*, (1984) 2 SCR 67: (AIR 1984 Sc 802).

being merely a handmaiden of justice, it should not stand in the way of access to justice to the weaker sections of Indian humanity. It became established that where the poor and the disadvantaged are concerned, who are barely eking out a miserable existence by their sweat and toil and who are victims of an exploited society without any access to justice, the Supreme Court will not insist on a regular writ petition, such that a simple letter addressed by a public spirited individual or a social action group acting *pro bono publico* would suffice to activate the jurisdiction of the court.¹³⁵⁴

One of the reasons for this relaxation is grounded on the prevalence of the widespread poverty, ignorance, illiteracy, deprivation and exploitation in India. That any insistence on a rigid formula of proceeding for enforcement of a fundamental right would become self-defeating, as it would place enforcement of fundamental rights beyond the reach of the common man. Furthermore, the Court added that the entire remedy for enforcement of fundamental rights which the Constitution makers regarded as so precious and invaluable that they elevated it to the status of a fundamental right, would become a mere rope of sand for the large masses of the people.¹³⁵⁵

Another reason for the relaxation is that when any member of a public or social organization espouses a cause of the poor, he should be able to move the Court by just writing a letter, because it was deemed that it would not be right or fair to expect a person acting *pro bono publico* to incur expenses from his own pocket in order to go to a lawyer and prepare a regular petition to be filed in Court for endorsement of the fundamental rights of the poor.¹³⁵⁶ In such cases, a letter addressed by a public spirited person to the Court to espouse a cause of the poor is thus regarded as an appropriate proceeding within the meaning of Article 32 of the Indian Constitution.¹³⁵⁷

‘The Supreme Court thus evolved what has come to be known as "epistolary jurisdiction,"¹³⁵⁸ where the Court can be moved by just addressing a letter on behalf of the disadvantaged class of persons,¹³⁵⁹ without the additional requirement of filing an affidavit in support of such a letter.¹³⁶⁰ Requiring a supporting affidavit was viewed by the Supreme Court as one that will defeat the objective of epistolary jurisdiction all together, as this will further inhibit easy access of the poor and vulnerable people, and

¹³⁵⁴ See *M.C. Mehta v. Union of India*, Air 1987 SC 1086.

¹³⁵⁵ See *Bandhua Mukti Morcha Vs Union of India*, (supra) where the Supreme Court held that there is no limitation as regards the kind of proceeding envisaged under clause (1) of Article 32 of the Indian Constitution, save that the proceeding must be "appropriate" and this requirement of appropriateness must be judged in the light of the purpose for which the proceedings are to be taken, namely, enforcement of a fundamental right. The Constitution makers deliberately did not lay down any particular form of proceedings for enforcement of a fundamental right nor did they stipulate that such proceedings should conform to any rigid pattern or straight jacket formula as, for example, in England.

¹³⁵⁶ See Bhagwati, P.N., op. cit. p. 571.

¹³⁵⁷ Ibid.

¹³⁵⁸ See *M.C. Mehta v. Union of India*, Air 1987 SC 1086.

¹³⁵⁹ See Bhagwati, P.N., op. cit. p. 571.

¹³⁶⁰ See *M.C. Mehta v. Union of India*, Air 1987 SC 1086.

the social action group.¹³⁶¹ The Court will also act even where its attention is drawn to a cause of the poor by an article contained in a newspaper.¹³⁶²

The court thus accepts letters¹³⁶³ and telegrams.¹³⁶⁴ This is irrespective of whether the letter was addressed to the court or an individual judge.¹³⁶⁵ 'Epistolary jurisdiction was a major breakthrough achieved by the Supreme Court in bringing justice closer to the large masses of people. As a result of which...the portals of the Court are thrown open to the poor, the ignorant and the illiterate, and their cases have started coming before the Court through public interest litigation.'¹³⁶⁶ Consequent upon this, a number of PIL cells have been opened all over the country to facilitate onward transmission of letters to the courts, in addition to those within the Supreme Court premises.¹³⁶⁷ The petitions are first screened in the PIL Cell and then assigned by the Chief Justice to a judge for hearing.¹³⁶⁸

The epistolary jurisdiction of the public interest litigation in India was said to have been influenced by the American Supreme Court's decision in *Gideon v. Wainwright*,¹³⁶⁹ where a postcard from a prisoner was treated as a petition,¹³⁷⁰ although this practice is not peculiar to a particular jurisdiction.¹³⁷¹ A letter is however only treated as a petition

¹³⁶¹ See *M.C. Mehta v. Union of India*, PIL-SCALE, p. 1519 s 5 cited in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 153.

¹³⁶² See Sandra Fredman, op. cit. p. 127.

¹³⁶³ See *Ram Kumar Misra v. State of Bihar* (1984) 2 SCC 451 cited in Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. note 38.

¹³⁶⁴ See *Paramjit Kaur v. State of Punjab* (1996) 7 SCC 20 cited in Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. note 39.

¹³⁶⁵ In *Bandhua Mukti Morcha v. Union of India*, (supra) the petitioner had addressed a letter to Hon'ble Bhagwati, J. alleging a violation of their rights. In that case the Supreme Court of India considered the question among others whether an action commenced by means of a letter addressed by a party on behalf of persons belonging to socially and economically weaker sections complaining of violation of their rights under various items of social legislation, can be treated as a writ of petition, within Article 32(1) as "Appropriate proceedings". The respondents in that case contended among others that, 1) A letter addressed by a party to this Court cannot be treated as a writ petition. Rejecting all the contentions and allowing the writ petition on its merits, the Court treated the letter as a writ petition. The court went further to state that Clause (1) of Article 32 confers the right to move the Supreme Court for enforcement of any of the fundamental rights, but it does not say who shall have this right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved.

¹³⁶⁶ See Bhagwati, P.N., op. cit. pp. 571-2.

¹³⁶⁷ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 153.

¹³⁶⁸ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 5.

¹³⁶⁹ (1963) 372 U.S. 355, Nigeria operates a Presidential system of government which is similar to the American system, coupled with the separation of powers, by the American Constitution (Articles 1, 2 and 3) which is also similar to the Nigerian system and makes the decisions of the Supreme Court of the United States, persuasive in Nigerian courts. See Hon. Kayode Eso (1990), op. cit. p. 57.

¹³⁷⁰ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 4.

¹³⁷¹ In the South African case of *S v. Twala (South African Human Rights Commission intervening)* 2000 (1) SA 879 (CC) cited in Budlender, Geoff, op. cit. p. 356, the Constitutional Court of South Africa 'treated a handwritten letter received from a prisoner, complaining of being frustrated in respect of the exercise of the right to appeal'. The letter was considered an application and after its consideration by

under the Indian PIL ‘where the letter is addressed by or on behalf of a person in custody or for enforcement of the constitutional or legal rights of a class or group of persons who belong to a disadvantaged segment of society, or for putting an end to the exploitation and injustice from which such persons are suffering.’¹³⁷²

It is important to note however that it is not every letter that is treated or acted upon by the court as a petition. Thus where a letter is in respect of a member of the community who has suffered a private injury, such a petition will not be entertained by the court;¹³⁷³ save in exceptional cases, as the court will instead forward the letter to the appropriate legal aid and advice board to be dealt with.¹³⁷⁴ This is to safeguard PIL from abuse.

While the Indian courts have made access to justice easy for the poor in that country by procedural relaxation, the cumbersome and technical nature of the fundamental rights enforcement procedure in Nigeria as outlined in this work makes it to be too lawyer centred¹³⁷⁵ and works against the poor. This means that the services of lawyers to articulate the appropriate legal remedy of his client becomes mandatory, without which one cannot access justice. In a country with large numbers of poor and ignorant people, such elaborate and cumbersome procedure will no doubt achieve a reverse purpose of inhibiting the enforcement of fundamental rights. This will also encourage impunity and make the fundamental rights meaningless to the masses.¹³⁷⁶

The above is accentuated by inconsistent judicial decisions on issues of strict adherence to procedural laws and liberal construction of those laws. In *Raymond Dongtoe v. Civil Service Commission of Plateau State*,¹³⁷⁷ the Supreme Court of Nigeria held among other decisions that where a special procedure is prescribed for the enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is

the Justices, the President of the Court directed that the application be treated as an application for leave to appeal, and determined the procedure to be followed in dealing with the appeal.

¹³⁷² See Bhagwati, P.N., op. cit. p. 573.

¹³⁷³ See *Bandhua Mukti Morcha v. Union of India*, (supra) which laid down the guiding principles of treating a petition.

¹³⁷⁴ See Bhagwati, P.N., op. cit. p. 573.

¹³⁷⁵ An applicant has to file an *ex parte* motion for leave to apply for the enforcement of a breach of a fundamental right, the motion must specify the provisions of the Rules under which it is brought, any other relevant Orders, the precise content of the relief sought, a summary of the relevant laws, both domestic and international, to be cited at the hearing of the application. Also Order 1, Rule 2(3) of the Rules requires that application must be accompanied by a statement containing, the name(s) and description(s) of the applicant(s), a restatement of the relief(s) sought from the court, and a more detailed statement of the grounds for relief. The statement must further be accompanied by an affidavit in support, verifying the relevant facts giving rise to the breach. The affidavit in support must contain the following: particulars of the deponent, i.e. name, address, citizenship and any other necessary particulars; it must establish the deponent’s relationship to the applicant(s), confirm the identity of the applicant(s), contain a comprehensive account of the facts that gave rise to the application and conclude with a statement that the deponent swears to the affidavit in good faith. It is after obtaining the leave of court that the applicant can now apply for an enforcement order by Motion on Notice (using Form No.1) or by Originating Summons (using Form No.2).

¹³⁷⁶ See Mauro Cappelletti, op. cit. p. 647, that an individual may even be unaware of his right.

¹³⁷⁷ [2001] N.W.L.R. (Pt. 717) p. 132.

fatal to the enforcement of that remedy.¹³⁷⁸ These decisions are however in conflict with the earlier decision of the Supreme Court in *Saude v. Abdullahi*,¹³⁷⁹ where the Court held that there are no clear words that the Rules laid down were the only procedure by which redress could be sought. So adopting a particular procedure will not impeach the remedy sought. In that particular case, the originating summons was signed by the legal practitioner to the respondent instead of the presiding judge as required by the Rules, and it was held not to impeach the proceedings for the enforcement of fundamental rights.

It is important to state that the Courts should not be unnecessarily strict in compliance with the Rules, especially on the enforcement of fundamental rights, so that the Rules are not elevated above the very rights which they are supposed to protect in the first place, otherwise the fundamental nature of those rights will be seriously eroded by undue legalism. This position was affirmed by the Court of Appeal in *Olisa Agbakoba v. The Director of State Security Service*,¹³⁸⁰ where the Court held that the end purpose of the Rules is to ensure that where infringement of fundamental rights has been complained of or threatened, there is a speedy enforcement of such rights and simplification of the procedure for dealing with such complaints.

This work is of the view that applicants should be able to come to court by any convenient means to enforce fundamental rights, following the Indian PIL model without any strict adherence to the Rules. The enforcement procedure rules were first put in place in 1980, 28 years ago and there is no doubt that the same are due for a comprehensive review, to address the flaws in them. It has therefore been recommended that the procedure should be liberalized and totally reviewed to enable an applicant to secure judicial redress with ease and without delay.¹³⁸¹

In *Alhaji Mohammed Shaaba Lafiaji v. Military Administrator of Kwara State*,¹³⁸² the court (although a High Court decision, which cannot override the decisions of Courts of Appeal and the Supreme Court) seemed to fully appreciate the importance of enforcing rights when it held that matters concerning the enforcement of fundamental rights of citizens are so important that the mode of access to courts to enforce these basic rights should not be restricted to one particular means or the procedure used in the attainment of the enforcement of these basic rights be made cumbersome and technical. Also, the Court of Appeal decision in *Nnamdi Azikiwe University & Ors v. Nwafor*,¹³⁸³ is another progressive and commendable construction of fundamental rights provisions in the Nigerian Constitution which aimed at facilitating access to justice.

¹³⁷⁸ Supporting this decision are, the Court of Appeal decision in *Abia State University v. Chima Anyaibe*, [1996] 1 N.W.L.R. (Pt. 439) p. 646; Supreme Court's decision in *Din v. Attorney General of Federation*, [1988] 4 N.W.L.R. (Pt. 87) p. 147.

¹³⁷⁹ [1989] 4 N.W.L.R. (Pt. 116) p. 387 at p. 419 per Eso JSC.

¹³⁸⁰ [1994] 6 N.W.L.R. (Pt. 351) p. 470 at p. 500.

¹³⁸¹ See Edoba B. Omoregie, *Enforcement of Fundamental Rights in Nigeria: Proposals for Reforms*, University of Benin Law Journal, (2005) 8 (1) U.B.L.J. pp. 100-105.

¹³⁸² [1995] F.H.C.L.R. 321.

¹³⁸³ [1999] 1 N.W.L.R. (Pt. 585) p. 116 at p. 133 per Salami JCA.

In that case, the Court of Appeal held that in order to render meaningful the provisions of the Constitution dealing with fundamental rights, the court should not be tied to the apron strings of the principle of practice and procedure governing trial of normal civil cases such as parties being bound by their pleadings,¹³⁸⁴ and that in the matter of enforcement of the fundamental rights, courts are less slavish to the rules of court; rather they use them as a handmaiden to do substantial justice. Taking the above into consideration, it becomes necessary for the Supreme Court to reverse its decision in *Raymond Dongtoe v. Civil Service Commission of Plateau State*.¹³⁸⁵ Courts should neither be tied to procedure nor should their institutional structures remain the same, as exemplified by India.¹³⁸⁶

This procedural liberalization has given wide access to the people and invigorated rights enforcement in India to a height that would not have been attained without the innovations of PIL, and to date, hundreds of petitions still pour in weekly at the Indian Supreme Court and other High Courts in the country.¹³⁸⁷

4.2.2.3 Appointment of Commissioners for the purpose of gathering evidence and the non-adversarial nature of PIL

At the commencement of PIL the court realized the total unsuitability of the adversarial procedure for this kind of litigation in India. The court is of the view that an adversarial procedure can operate fairly and produce just results only if the two contesting parties are evenly matched in strength and resources, and that where this is not so, the poor will be at a disadvantage.¹³⁸⁸ Under the adversarial system, the parties are to gather their facts, assemble their witnesses, are bound by their pleadings and the facts deposed to are subject to rigorous cross-examination to ascertain the credibility. The respondent too will file counter affidavits where necessary.¹³⁸⁹ The success of an action in adversarial systems depends primarily on how the parties are able to employ the use of procedural and substantive laws to logically and effectively present their matters before the court, including adducing necessary evidence and arguing the issues involved (both facts and law).¹³⁹⁰

It was therefore reasoned that where one of the parties to litigation is weak and helpless and does not possess adequate social and material resources, he is bound to be at a disadvantage under the adversarial system, not only because of the difficulty in getting competent legal representation, but more than anything else because of the inability to produce relevant evidence before the Court. It was then obvious to the court that the

¹³⁸⁴ As enunciated in the cases of *Emegokwue v. Okadigbo* (1973) 4 S.C. 113 and *Olabanji v. Ajiboye* (1992) 1 N.W.L.R. (Pt. 218) 473 at 485.

¹³⁸⁵ Supra.

¹³⁸⁶ See Sandra Fredman, op. cit. p. 100.

¹³⁸⁷ About 50 percent of the petitions are also said to be screened out after brief hearings without particular reasons being adduced. See Sandra Fredman, op. cit. p. 128.

¹³⁸⁸ See *Bandhua Mukti Morcha v. Union of India* (supra).

¹³⁸⁹ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 5.

¹³⁹⁰ See the Indian case of *L.K. Koolwal v. State of Rajasthan* AIR 1988, RAJ 2.

problem of proof, presents difficulties in PIL brought to vindicate the rights of the poor.¹³⁹¹

The problem of gathering evidence in support of the case for the poor also became compounded by the opposing respondents who often deny in their affidavit, the allegations made against them, and the respondents sometimes contest the *bona fides* or the degree of the relevancy of the information on which the litigation is based and sometimes they attribute wild ulterior motives to the social activists bringing the litigation.¹³⁹² The court also viewed it a great financial burden on social activists who have brought an action on behalf of the masses to gather relevant materials before the court.¹³⁹³

The above situations led to the adoption of the practice of appointing diverse people such as lawyers, professors of law, court officials, journalists, bureaucrats, district judges, mental health professionals, experts and bodies of experts as commissioners in order to gather material facts on behalf of the poor petitioner(s)¹³⁹⁴ and to make a report to the court, which might also contain recommendations.¹³⁹⁵ Expert committees are also appointed which offer advice to the courts on how to deal with matters which have peculiar technicality.¹³⁹⁶ This practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant evidence was institutionalized by reason of the judgment of the Supreme Court in *Bandhua Mukti Morcha v. Union of India*,¹³⁹⁷ where the court was of the view that strict adherence to the adversarial procedure can sometimes lead to injustice particularly when the parties are not evenly balanced in social or economic strength.

The reports of the commissioners have evidentiary value and they serve as *prima facie* evidence of the facts and data stated in those reports, although it is left for the court to determine what weight it should attach to the facts and data contained in the reports in light of the various affidavits filed in the proceedings.¹³⁹⁸ The evidentiary value of the commissioners' report was said to account for the reasons why the Supreme Court is careful to appoint a responsible person as commissioner to make an inquiry or investigation into the facts relating to the complaint. This also provides the reason why the commissioner appointed by the Court must be a responsible person who enjoys the

¹³⁹¹ See Bhagwati, P.N., op. cit. p. 573; see also *Bandhua Mukti Morcha v. Union of India* (supra).

¹³⁹² See Bhagwati, P.N., op. cit. p. 574.

¹³⁹³ Ibid.

¹³⁹⁴ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 5.

¹³⁹⁵ See Bhagwati, P.N., op. cit. p. 573.

¹³⁹⁶ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 241.

¹³⁹⁷ 1984 A.I.R. 802, 816-17, 845, 848-49 (S.C.); see Bhagwati, P.N., op. cit. p. 575, where the case was also cited.

¹³⁹⁸ See *Bandhua Mukti Morcha v. Union of India* (supra).

confidence of the court and who is expected to carry out his assignment objectively and impartially without any predilection or prejudice.¹³⁹⁹

In fact in the *Bandhua Mukti Morcha's* case, the respondents contended among other things that, in a proceeding under Article 32 of the Indian Constitution, the Supreme Court is not empowered to appoint any commission or an investigating body to enquire into the allegations made in the writ petition, and that reports made by such commissions are based only on *ex parte* statements which have not been tested by cross-examination and therefore have no evidentiary value. The court however rejected all the contentions and allowed the writ petition on the merits, and appointed a commission to inquire into the allegations made by the petitioner.

When the court receives the report of the commissioner, copies of the same are supplied to the parties to verify and if they want to dispute any of the facts stated in it, they may do so by filing an affidavit and the court will then consider the report and the affidavit filed and proceed to adjudicate on the issues arising from the petition before the court.¹⁴⁰⁰ This practice clearly departs from the adversarial procedure in proceedings where statements made and affidavits filed are often tested by rigorous cross-examination.

It has however been held that the fact that the statements made in the reports of the commissioner are not tested by cross-examination does not make the report lose its evidentiary value and that subjecting statements in the report to cross-examination would be to introduce the adversarial procedure inherited from the British, which is considered inappropriate to the Indian situation.¹⁴⁰¹ The court also reasoned that if the adversarial procedure is truly followed in their case, the poor would never be able to enforce their fundamental rights and that the result would be nothing but a mockery of the Constitution.¹⁴⁰² The Court further views cross-examination of affidavits as having the tendency to 'encourage defensiveness rather than cooperation.'¹⁴⁰³

The court thus termed the procedure being adopted as cooperative in view of its non-adversarial nature, which requires the cooperation of participating sectors in the administration of justice with the aim of granting legal relief without cumbersome formality and heavy expenditure.¹⁴⁰⁴ In this way, PIL is not perceived in the nature of adversary litigation but rather as a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community; thus when the court entertains PIL, it does not do so in a confrontational mood but in an attempt only to ensure distributive justice for the benefit of the have-nots and to protect them against violation of their basic human rights.¹⁴⁰⁵

¹³⁹⁹ Ibid.

¹⁴⁰⁰ See *Bandhua Mukti Morcha v. Union of India* (supra).

¹⁴⁰¹ Ibid.

¹⁴⁰² Ibid.

¹⁴⁰³ See Sandra Fredman, op. cit. p. 136.

¹⁴⁰⁴ Ibid per Pathak, J.

¹⁴⁰⁵ See *Bandhua Mukti Morcha v. Union of India* (supra).

In an adversarial system, parties are usually combative and defensive with a view to sway the court from a rigid standpoint.¹⁴⁰⁶ However, in the non-adversarial style of PIL litigation, the court, the parties and their lawyers are expected to participate (cooperate) in resolving a problem of public concern, and as such that parties are not seen as adversaries and that this approach has assisted in changing the mindset of both judges and lawyers, as there are no winners or losers.¹⁴⁰⁷ The style is advantageous as opposed to the adversarial system, where the mindset of lawyers and parties is to win at all cost, who can sometimes employ any means towards this objective, including tactics that will frustrate the case of the petitioner.¹⁴⁰⁸

The cooperative nature of PIL has been demonstrated to be helpful for instance, in PIL cases where counsel representing the government perceive their role as cooperative and makes necessary 'recommendations to the State to take a constructive role in proceedings rather than polarizing the dispute by defending their position regardless of the circumstances.'¹⁴⁰⁹ In one matter relating to the right to food, the Attorney General of India was said to have been placed on record as conceding that the case in question 'should not be regarded as adversarial litigation but a matter of concern for all.'¹⁴¹⁰ However, the cooperative nature of PIL has been criticized for not being very helpful, as State authorities were said to have been found to be largely uncooperative with the court.¹⁴¹¹

The role played by the Court under PIL in India is more assertive than in traditional actions¹⁴¹² and the 'judge is given greater participatory role in trials so as to place the poor as far as possible on a footing of equality with the rich in the administration of justice'.¹⁴¹³ This in turn provides equal justice to the disadvantaged sections of society, as there can be no equal justice where the kind of trial a man gets depends on the

¹⁴⁰⁶ See Sandra Fredman, op. cit. pp. 107 and 108.

¹⁴⁰⁷ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 6.

¹⁴⁰⁸ See I.A. Ayua and D.A. Guobadia (eds) (2001), op. cit. p. 21 Table 1; Hon. Dr. T. Akinola Aguda (1987), op. cit. pp. 4 and 6.

¹⁴⁰⁹ See Sandra Fredman, op. cit. p. 128.

¹⁴¹⁰ Ibid.

¹⁴¹¹ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 157 where the author also cited the case of *Sheela Barse v. Union of India*, PIL –SCALE, p. 127 s. 9 where the court remarked about the uncooperative attitude of State authorities. See also S. Muralidhar (2002), *Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary*, a paper presented at the First Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002 (No. 2), where the author stated that mandatory orders given and supervised by the courts are premised on the general apathy displayed by the executive with respect to courts' directions.

¹⁴¹² See *Bandhua Mukti Morcha v. Union of India* (supra). It has been argued that in view of the fact that the majority of the citizens in India 'were unaware of their rights, and much less in a position to assert them, the fundamental rights guaranteed under the Constitution remain empty promises for the majority of illiterate and indigent citizens under adversarial proceedings'. See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 2. The result is that even when a poor person has genuine grievance, he cannot access the court.

¹⁴¹³ Ibid at p. 2.

amount of money he has.¹⁴¹⁴ In another way, the appointment of commissioners to gather facts has reduced delays in civil cases,¹⁴¹⁵ as a speedy trial is driven by the courts investigative procedure and assertive roles.¹⁴¹⁶ The speedy trial in PIL cases has led to the complaint that they are being given priority over other matters which have been pending in courts for several years.¹⁴¹⁷

The appointment of commissions to gather material facts is a major breakthrough for the poor in having equal access to justice for the redress of fundamental rights violations, as the poor are frequently in a position of aggravated inferiority due to their fear of possible reprisals¹⁴¹⁸ by the other party and to further lay the burden of proof solely on the poor will be too much a burden.¹⁴¹⁹ This is a very attractive part of the Indian PIL model which is crucial to enforcement of rights for the poor. The issue of burden of proof has remained a serious hurdle for the poor in Nigeria in the course of enforcing their rights, since the courts still adhere strictly to the adversarial procedure inherited from Britain, where the court is seen as an unbiased umpire which must not descend into the arena of justice.

Another important aspect of PIL that deserves to be mentioned is the practice by courts of appointing lawyers, and very senior lawyers too as *amicus curie*. Where PIL is initiated in person, the courts also appoint lawyers to act as *amicus curie* thus indirectly providing legal aid to the poor.¹⁴²⁰ They play a useful purpose of assisting the court to sift out relevant facts from documents and pleadings, bring out the legal issues involved, narrow down the issues and sharpen the focus of discussion.¹⁴²¹ The lawyers discharge this duty professionally without charging a fee, and they feel honoured for being called upon by the court to assist, and often leave other pressing briefs to attend to the courts.¹⁴²² This will no doubt add to the quality of justice that goes to the poor, who

¹⁴¹⁴ See the decision of the United States Supreme Court to that effect in *Griffin v. Illinois*, 351 U.S. 12 (1956) at 1 cited in Kreppel, Gary, op. cit. p. 276.

¹⁴¹⁵ The technical report on the Nigerian Court procedure project referred to above indicated how causes inherent in the Rules of court and its abuse contribute to delays in civil trial and denial of justice in Nigeria. See I. A. Ayua and D.A. Guobadia, (eds) (2001), op. cit. pp. 24-25.

¹⁴¹⁶ In the early days of the Supreme Court in Lagos, Nigeria to initiate a case, an individual needed to approach the Registrar of the Court, a position said to be held from 1876 to 1899 by an influential Nigerian, John Augustus Otonba Payne. It was however recorded that persons of low social status sometimes approach the court through more powerful patrons. See Thomas Spear, op. cit. p. 204

¹⁴¹⁷ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 265.

¹⁴¹⁸ Mauro Cappelletti, op. cit. p. 647 has noted that an individual may not be able to protect himself adequately and that he may fear powerful violators among others.

¹⁴¹⁹ See Jean-Bernard Marie, "National Systems for the Protection of Human Rights", in Janusz Symonides (ed) (2003), op. cit. pp. 269-270.

¹⁴²⁰ See Sandra Fredman, op. cit. p. 127.

¹⁴²¹ See S. Muralidhar (2002), op. cit. p. 4. The author mentioned that in the case of *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 dealing with sexual harassment of women in the workplace, Mr. F.S. Nariman, Senior Advocate assisted the Supreme Court as *amicus curie* in the matter.

¹⁴²² Ibid at p. 6.

would ordinarily not have been able to afford the services of lawyers in the first place, but now enjoys such services and of the very senior ones.¹⁴²³

However, the appointment of commissions by the courts has been criticized on the grounds of likelihood of creating ‘a parallel structure of decision-making deep in the area of executive competence.’¹⁴²⁴ This is said to be based on the fact that the commissions not only gather facts but also give recommendations to the courts on possible solutions to be adopted by the court in considering the issue at hand.¹⁴²⁵ It has therefore been advised that ‘the Court should put in place safeguards in terms of transparency and accountability for the Commissions.’¹⁴²⁶

The assertive role of the courts and the *amicus curie* in PIL cases have been criticized by PIL practitioners, who see the cases as being hijacked from their control and feel they are no able to steer the course of litigation.¹⁴²⁷ This has also been said to raise the issue of accountability to the very people whose problems are sought to be addressed by PIL.¹⁴²⁸ It has to be appreciated however, that in the adversarial system where lawyers have almost unfettered control, coupled with the ‘excessive legal formalism’¹⁴²⁹ gives room for mischievous use of rules of court and other sharp practices, with the intention of prolonging trials.¹⁴³⁰ Such sharp practices are sometimes at the request of or are encouraged by litigants, with the result that it is difficult for the court to manage or save time.¹⁴³¹

The need for ‘the judge to prevent those analogues of warfare, delay and ambush, which have historically been normal means of wasting an adversary by postponing trial’ and that this ‘requires a sea change in the traditional approach of lawyers to litigation, in its very essence an antagonistic, adversarial and secretive process under which actual combat (‘fighting’) is simply represented in an externally monitored, heavily ritualized verbal exchange’¹⁴³² has been instrumental to the courts’ assertive role in PIL cases.

It must be noted under the U.S. PIL, public interest law firms also serve as very active *amicus curie* in about 61 percent of public interest litigation cases decided by the Supreme Court at the early period.¹⁴³³ Also the court plays a crucial role in the control and supervision of proceedings.¹⁴³⁴ So, these features are not peculiar to the Indian model and the aim is to maintain a level of control over litigation, for the overall goal of

¹⁴²³ In Nigeria, it was recorded that only wealthy or educated litigants often hire lawyers to represent them in court, while others appear without representation. See Thomas Spear, op. cit. p. 204.

¹⁴²⁴ See Sandra Fredman, op. cit. pp. 135 - 136 and 136.

¹⁴²⁵ Ibid at p. 135.

¹⁴²⁶ Ibid.

¹⁴²⁷ S. Muralidhar, “Judicial Enforcement of Economic and Social Rights: The Indian Scenario”, in Fons Coomans (ed.) (2006), op. cit. p. 242.

¹⁴²⁸ Ibid.

¹⁴²⁹ Ibid at p. 259.

¹⁴³⁰ See I.A. Ayua and D.A. Guobadia (2001), op. cit. p. 26.

¹⁴³¹ Ibid pp. 26 – 27.

¹⁴³² See Simon Roberts, *Settlement as Civil Justice*, 63 Mod. L. Rev. 744 (2000) p. 740.

¹⁴³³ See Karen O’Connor and Lee Epstein, op. cit. p. 489.

¹⁴³⁴ See Mauro Cappelletti, op. cit. p. 681.

achieving justice. Notwithstanding the criticisms, the procedural innovations brought about in human rights in India are a proper vehicle to make law and the legal machinery somehow relevant for the poor in daily life.¹⁴³⁵

4.2.2.4 Innovative reliefs/remedies

The Indian PIL is mainly used for the enforcement of constitutional or legal rights and petitions covering diverse issues, ranging from petitions concerning bonded labour, neglected children, human rights, prisoners, against the police, against atrocities on women, children, scheduled castes and tribes, environmental issues, adulteration of drugs and food, maintenance of heritage culture, public accountability and other matters of public importance entertained by the court.¹⁴³⁶ PIL 'has also been a central component in campaign against corruption both in government and in the judiciary itself.'¹⁴³⁷

However in the Guidelines to be followed for entertaining petitions under PIL which were drafted by ten judges of the Supreme Court for the use of the PIL Cell, ten categories are mentioned as being ordinarily entertained as PIL.¹⁴³⁸

With the diverse issues cognizable before the court, the question of appropriate remedies that can be given to the disadvantaged section of the community has become crucial. The court then had to evolve new remedies having found that the existing remedies of prerogative writs of *certiorari*, prohibition or *mandamus*, or by making orders granting damages or injunctive relief, were simply inadequate to relieve the suffering of the poor, especially where there is continuous repression and denial of rights.¹⁴³⁹ The Supreme Court thus embarked on exploring new remedies which are innovative and unconventional, aimed at ensuring distributive justice to the deprived sections of the community and intended to bring about affirmative action on the part of

¹⁴³⁵ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 166; see Sandra Fredman, op. cit. pp. 129 and 146.

¹⁴³⁶ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 5.

¹⁴³⁷ See Sandra Fredman, op. cit. p. 129.

¹⁴³⁸ These are: Bonded labour matters; Neglected children; Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violations of labour laws (except in individual cases); Petitions from jails complaining of harassment for premature release and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right; Petition against police for refusing to register a case, harassment by police and death in police custody; Petition against atrocities on women, in particular harassment of bride, bride-burning, kidnapping, etc.; Petitions complaining of harassment or torture of villagers by co-villagers or by police from persons belonging to Scheduled Castes and Scheduled Tribes and economically backward classes; Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food, adulteration, maintenance of heritage and culture, antiques, forest and wildlife and other matters of public importance; Petitions from riot-victims; Family pension. See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 166.

¹⁴³⁹ See Bhagwati, P.N., op. cit. p. 575.

the State and its agencies.¹⁴⁴⁰ The reliefs granted are corrective rather than compensatory and are focused on the future.¹⁴⁴¹

In line with the desire to fashion new remedies, the Supreme Court in *Bandhua Mukti Morcha v. Union of India*¹⁴⁴², decided that in respect of the scope and ambit of its jurisdiction under the Indian Constitution, stated that Article 32¹⁴⁴³ does not merely confer on it power to issue a direction, order or writ for the enforcement of fundamental rights of the people, but that the court has all incidental and ancillary power, including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. The court held further that it was in realization of this constitutional obligation that the Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.¹⁴⁴⁴

The Court then forges remedies as may be suitable to a particular case. Some of these remedies include detailed and far-reaching directions to specific government bodies or agencies, to judicial monitoring of State institutions, granting of damages to victims of government brutality and the unique order of interim compensation,¹⁴⁴⁵ among others. In the instant case of *Bandhua Mukti Morcha*, the Supreme Court made an order giving various directions for identifying, releasing and rehabilitating labourers who were held in debt bondage. Directions were also made for observance of labour laws,¹⁴⁴⁶ creating legal awareness, providing safe drinking water, provision of medical assistance and educational facilities.¹⁴⁴⁷ Also in *Hussainara Khatoon v. State of Bihar*,¹⁴⁴⁸ concerning pre-trial detention cases, the Supreme Court directed the State government to prepare an annual census of prisoners on trial as of 31 October of each year and submit it to the High Court, and further directed the High Court to ensure early disposal of cases where prisoners have been in detention for too long.

¹⁴⁴⁰ Ibid at pp. 575-6.

¹⁴⁴¹ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 159.

¹⁴⁴² Supra.

¹⁴⁴³ Art. 32(2) of the Indian Constitution provides that 'The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.'

¹⁴⁴⁴ See *Bandhua Mukti Morcha v. Union of India*, (supra).

¹⁴⁴⁵ In *BodhisattwaGautam v. Subhra Chakraborty* (1996) 1 SCC 490, the Supreme court ordered the accused to pay Rs.1,000 per month as interim compensation to the victim of rape during the pendency of the criminal case. The court held rape to be violative of the right to life under Article 21 which includes the right to live with human dignity. See Indian Cases, <http://www.hrcr.org/safrica/access_courts/India/Indiacases.html> accessed 23 October 2007. This is as opposed to the procedure in common law where such interim relief will be normally limited to maintaining the status quo in the matter, until the final disposition of the case.

¹⁴⁴⁶ In that case the Court found that legislation dealing with welfare of the people, such as the Bonded Labour (Abolition) Act 1976 and the Minimum Wage Act 1948 which could contribute to the dignity of the people had not been implemented.

¹⁴⁴⁷ Ibid at pp 848-49 cited in Bhagwati, P.N., op. cit. p. 576.

¹⁴⁴⁸ 1979 A.I.R. 1360 (S.C.) cited in Bhagwati, P.N., op. cit. p. 576.

In *Khattri v. Bihar*,¹⁴⁴⁹ where prisoners undergoing trial have been blinded, the Supreme Court directed that vocational training be given them and that in addition, compensation should be paid to them. Also in *Sheela Barse v. State of Maharashtra*, a case brought by a journalist, the Supreme Court directed that separate lock-up should be provided for women in police custody with female police constables in charge. The Court further directed that a notice be put up in each police lock-up, informing arrested persons of their rights.¹⁴⁵⁰ In some other petitions, the court can give a time frame within which to comply with the order of court in providing remedies as appropriate.¹⁴⁵¹

Some of the innovative remedies are particularly helpful in securing fundamental rights for the poor and enhancing the capacity of the poor to lift them out of poverty. In *L.K. Koolwal v. State of Rajasthan*,¹⁴⁵² the High Court of that State decided that the citizens have a right to know about the activities of the State, which the court regarded as fundamental in a democratic society. This decision is vital to right to information and equally essential to the freedom of the press, accountability and good governance, of which the poor can avail themselves to demand accountability from government actors. Fundamental to the poor are the decisions upholding ESC rights for the people,¹⁴⁵³ by liberal and beneficial interpretation of fundamental rights provisions in the Indian Constitution.

Also in *Vishaka v. State of Rajasthan*,¹⁴⁵⁴ the Supreme Court not only held that sexual harassment constitutes a violation of women's right to dignity, but went further to fill a gap in the law by drafting 'quasi-legislative guidelines, drawing on internationally recognized norms,'¹⁴⁵⁵ in order to deal with the problems of sexual harassment of women at the workplace.¹⁴⁵⁶

In *Lakshmi Kant Pandey v. Union of India*,¹⁴⁵⁷ the Supreme Court laid down the guidelines to be complied with in cases of inter and intra country adoption of children, apparently in an effort to prevent children from abuse and exploitation that may be associated with adoption. Also in *Sheela Barse v. Union of India*¹⁴⁵⁸ concerning the case of underage children illegally kept in jail, brought by a social worker who was the petitioner, the Court directed that surprise visits should be paid to the police lock-ups by a judge of the City court appointed by the Principal Judge. The Court remarked that

¹⁴⁴⁹ 1981 A.I.R. 928 & 1068 (S.C.).

¹⁴⁵⁰ See also Bhagwati, P.N., op. cit. p. 576.

¹⁴⁵¹ See *Ratlam Municipality v. Vardhichand* AIR 1980 SC 1622 which concerned the lack of public convenience of toilets which resulted in nuisance to the neighbourhood. The Supreme Court of India gave the municipality a time frame within which to comply with the order of court of remedying the situation, cited in Budlender, Geoff, op. cit. p. 357.

¹⁴⁵² Supra.

¹⁴⁵³ Most of these rights are contained in Part IV of the Indian Constitution as Directive Principles of State Policy but are not justiciable under Article 37 of the Constitution. The position is the same in Nigeria.

¹⁴⁵⁴ (1997) 6 SCC p. 241.

¹⁴⁵⁵ See Sandra Fredman, op. cit. p. 141.

¹⁴⁵⁶ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems" in B.H. Kirpal et al. (eds) (2001), op. cit. p. 4.

¹⁴⁵⁷ AIR 1984 SC 469.

¹⁴⁵⁸ (1986) 3 SCC 596.

children are national assets and those in jails deserved to be treated with special care. The court therefore advocated the setting up of remand and juvenile homes for children in jails.¹⁴⁵⁹

The Supreme Court has also ensured speedy trial for accused persons by holding that where it found that the right of an accused to speedy trial has been infringed, it shall proceed to quash the charge or conviction as the case may be.¹⁴⁶⁰ The apex Court has further held that the right to speedy trial encompasses the different stages of investigation,¹⁴⁶¹ inquiry, trial, appeal, revision and even retrial.¹⁴⁶² In this way, PIL is being used to overcome the problem of delays in the administration of justice.¹⁴⁶³ The Court has awarded compensation for custodial violence or death as may be appropriate¹⁴⁶⁴ and upheld the right of people detained by the police not to be tortured or beaten up but to be treated with dignity.¹⁴⁶⁵

PIL has also been used to invoke legal aid for the poor in a novel way. The court for instance has held that the right to legal aid services is incidental to the right to life in Article 21.¹⁴⁶⁶ Also in appropriate cases, the Court has taken the responsibility of making firm arrangement for the provision of legal aid and other needed assistance to disadvantaged groups.¹⁴⁶⁷ This initiative 'reinforced by the aggressive involvement of social action groups in the work of committees of enquiry appointed by the Court, has

¹⁴⁵⁹ See Indian Cases, <http://www.hrcr.org/safrica/access_courts/India/Indiacases.html> accessed 23 October 2007.

¹⁴⁶⁰ See *Sheela Barse v. Union of India* (supra).

¹⁴⁶¹ In *Hitendra Thakur v. State of Maharashtra*, (1994) 3 Scale 105 the Supreme Court stressed the fact that investigations of accused persons must be completed in a timely manner and that where it becomes necessary to seek more time, the investigating agency must submit itself to the scrutiny of the public prosecutor, satisfy him of the progress made and justify the need to further keep the accused in custody.

¹⁴⁶² See *A.R. Antulay v. R.S. Nayak*, AIR 1992 SC 1701.

¹⁴⁶³ In *Hussainara Khatoon (IV) v Home Secretary, State of Bihar* (1980) 1 SCC 98, concerning prisoners undergoing trial, where a large number of men and women, including children were put in prison custody awaiting trial for years. The Court ordered their immediate release and held that fairness is impaired under Article 21 where procedural law does not provide for speedy trial of the accused and does not provide for his pre-trial release on bail on his personal bond, where he is indigent and there is no substantial risk of his absconding. The court further held that the State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to improving speedy trial (per Bhagwati J, at 107, para 10). See Indian Cases, <http://www.hrcr.org/safrica/access_courts/India/Indiacases.html> accessed 23 October 2007.

¹⁴⁶⁴ *Nilabeti Behara v. State of Orissa*, W.P. Cri. No. 488 of 1988.

¹⁴⁶⁵ See *Sanjay Suri v. Delhi Administration*, AIR 1988 SC 414; In *Khatris Vs State of Bihar* (1981) 1 SCC, 623 a case pertaining to the blinding of persons undergoing trials by the police while in custody, where the Supreme court directed that they be treated at the State's expense and seriously condemned the lawlessness of the police for conduct which was described as a crime against humanity, which showed that they are not law enforcers but law breakers. In *Raghubir Singh Vs State of Haryana*, (1980) SCC 70, the Supreme Court expressed its anguish at the recurrence of police torture during investigation and held, "we are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death".

¹⁴⁶⁶ See *Sheela Barse v. Union of India* (supra).

¹⁴⁶⁷ See Peiris, G. L., op. cit. p. 84.

gone a long way towards mitigating the infirmities of less privileged sections of the community in respect of access to justice.’¹⁴⁶⁸

In *Khatri v. State of Bihar II*,¹⁴⁶⁹ the Supreme Court held that the State is under an obligation to provide free legal service to an indigent accused not only at the stage of trial but also at the stage where he is produced before the Magistrate as well as when he is remanded from time to time. The Court emphasized that it is the legal obligation of the magistrate or judge before whom the accused is produced to inform him of his right to legal aid, if he is unable to engage a lawyer on account of poverty or indigence, and that such right will be illusory for the indigent accused unless the trial judge informs him of such a right. The court further held that if a trial is held without affording legal aid to an indigent accused at State expense, the conviction will be set aside. In *Hussainara Khatoon v. State of Bihar*,¹⁴⁷⁰ the court upheld that prisoners undergoing trial are entitled to free legal aid under the free legal aid contained in Article 39A of Part IV of the Indian Constitution, 1950.¹⁴⁷¹

The above decisions have been very helpful to the poor in ensuring provision of legal aid which is vital to accessing courts and justice. For this reason PIL has been viewed as ‘a strategic arm of the legal aid movement intended to bring justice within the reach of those who, on account of their indigency, illiteracy, and lack of resources, were not able to reach the courts.’¹⁴⁷² On account of the usual government’s excuse of limited resources for failure to implement adequate legal aid for the poor, the query has been raised for instance that: ‘Are we to accept the preposterous notion that in times of inflation, constitutional rights go by the boards?’ Definitely this cannot be so, as the author concluded, and posited that ‘no costs are too high to ensure equality of access.’¹⁴⁷³

Despite the Supreme Court’s ingenuity in granting innovative remedies to petitioners, it has however been criticized for granting superfluous reliefs, such as granting reliefs beyond what was asked for by the petitioner,¹⁴⁷⁴ going beyond the case under

¹⁴⁶⁸ Ibid.

¹⁴⁶⁹ (1981) 1 SCC 627 See Indian Cases,

<http://www.hrcr.org/safrica/access_courts/India/Indiacases.html> accessed 23 October 2007.

¹⁴⁷⁰ (1981) 1 SCC 635.

¹⁴⁷¹ Which is the Directive Principles of State Policy and provides that ‘The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.’

¹⁴⁷² See Ashok H. Desai and S. Muralidhar, “Public Interest Litigation: Potentials and Problems”, in B.H. Kirpal et al. (eds) (2001), op. cit. p. 2.

¹⁴⁷³ See Weinstein, Jack B., op. cit. 657.

¹⁴⁷⁴ See *Khatri v. State of Bihar* (supra), where the court gave orders that the prisoners undergoing trial that were blinded while in police custody be paid Rs. 500 for them to be able to bring their relations to New Delhi to attend to them while receiving medical treatment in hospital and a further sum of Rs. 300 was also ordered to be paid monthly for their maintenance. Case cited in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 160.

consideration and extending remedies to the whole class of petitioners,¹⁴⁷⁵ and offering remedies to other people aside from the petitioner on whose behalf the petition was initiated.¹⁴⁷⁶ Offering of remedies to other classes of people will itself be in consonance with serving public interest purposes,¹⁴⁷⁷ such that members of the public in similar situations will not have to come to court and litigate over the same issue.

4.2.2.5 Innovative interpretations

One of the noble features of the Indian PIL is the beneficial and innovative/expanded interpretations the courts give to the constitutional provisions and even legislation in order to make some of the rights meaningful. In the landmark case of *S.P. Gupta v. Union of India*,¹⁴⁷⁸ the Supreme Court interpreted that the right to life in Article 21 of the Indian Constitution to include the right to a means of livelihood and right to human dignity. Also in *Bandhua Mukti Morcha v. Union of India*¹⁴⁷⁹ the Supreme Court upheld the right of the bonded labourers to live in dignity and free of exploitation. The Court further interpreted that Article 21 read in conjunction with the Directive Principles of State Policy includes the right to health. Of particular importance to enhancing ESC rights is the case of *Francis Coralie v. Union Territory of Delhi*¹⁴⁸⁰ where the Court also held that the right to life under Article 21 includes the right to live with human dignity with the basic necessities of life appertaining to it, such as adequate nutrition, clothing, shelter, facilities for reading and writing, etc.

The Supreme Court also upheld the right to education in *J. P. Unnikrishnan v. State of Andhra Pradesh*¹⁴⁸¹ by construing the right to life in Article 21 of the Indian Constitution under Part III – Fundamental Rights, together with the provisions in Articles 38,¹⁴⁸² 39(a) and (f),¹⁴⁸³ 41¹⁴⁸⁴ and 45¹⁴⁸⁵ under Part IV - Directive Principles of

¹⁴⁷⁵ In *Khatari v. State of Bihar (supra)*, for instance, the Court also made directions relating to other blinded prisoners apart from the main petitioners in that suit. In *Bandhua Muti Morcha v. Union of India (supra)* the Court made directions that all bonded labourers in Faridabad should be released and that transportation should be provided to take them home. Case cited in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 161.

¹⁴⁷⁶ In *Bandhua Muti Morcha v. Union of India (supra)* the Court gave a direction that camps be organized periodically to create awareness among the workers in the stone quarries about their rights - a relief not requested. Case cited and discussed in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 161.

¹⁴⁷⁷ See Mauro Cappelletti, op. cit. 675.

¹⁴⁷⁸ *Supra*.

¹⁴⁷⁹ *Supra*.

¹⁴⁸⁰ (1981)1 SCC 608, AIR 1981, SC 746.

¹⁴⁸¹ (1993) 1 SCC 645 through 735.

¹⁴⁸² Which provides for a 'State to secure a social order for the promotion of welfare of the people.- (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. (2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.'

¹⁴⁸³ Article 39(a) and (f) provides that 'The State shall, in particular, direct its policy towards securing - (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (f) that children are given opportunities and facilities to develop in a

State Policy, declaring that going by those provisions, the Constitution made it compulsory for the State to provide education for the people and that the objectives contained in the Preamble to the Constitution¹⁴⁸⁶ cannot be realized unless education is provided for the citizens. The Court stated further that Parts III and IV of the Constitution (i.e. fundamental rights and Directive Principles, which incorporates ESC rights) are supplementary to each other and that unless the right to education contained in Article 41 is made a reality, the fundamental rights under Part III of the Constitution will remain beyond the reach of the illiterate majority. The Court consequently held that children have a right to education up to the age of fourteen.

In the case of *People's Union for Civil Liberties (PUCL) v. Union of India*,¹⁴⁸⁷ the Supreme Court lamented that despite the fact that grains were available in large quantity in government reserves, they were not distributed among the poor and destitute, which resulted in starvation and death.¹⁴⁸⁸ The Court then directed the government to make provision of minimum rations of grains which were at the time available in surplus at the State warehouses through the public distribution system 'with priority to those living below the poverty line.'¹⁴⁸⁹ In this way, the Court framed the right to life as requiring immediate fulfilment and not subject to progressive realization, thus it cannot depend on the availability of resources.¹⁴⁹⁰

The above case has resulted in the intervention by the Court in the implementation of related schemes, some of which are 'the Public Distribution System (PDS), which distributes food grain and other basic commodities at subsidized prices through 'fair price shops'; special food-based assistance to destitute households (Antyodaya); and the Integrated Child Development Scheme (ICDS) which seeks to provide young children with an integrated package of services such as nutrition, health care and pre-school education, as well as covering adolescent girls, pregnant women and lactating

healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.'

¹⁴⁸⁴ Article 41 provides 'Right to work, to education and to public assistance in certain cases. - The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.'

¹⁴⁸⁵ Article 45 states 'Provision for free and compulsory education for children. - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.'

¹⁴⁸⁶ The Preamble provides: 'WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.'

¹⁴⁸⁷ (2001) 7 SCALE 284 cited in S. Muralidhar (2002), op. cit. p. 4.

¹⁴⁸⁸ See Sandra Fredman, op. cit. p. 130.

¹⁴⁸⁹ Ibid at p. 3. Some 40 members of the tribal Sahariya community which was badly affected by drought have starved to death while some 60 million surplus tonnes of grain were stored in government godowns (warehouses). See X, "Freedom from Poverty", in Wolfgang Benedek (ed) (2006), op. cit. p. 82. In India, under a public distribution system, villagers who are living below the poverty line are entitled to ration cards, which allow them to buy subsidized grain from government shops. Ibid.

¹⁴⁹⁰ See Sandra Fredman, op. cit. p. 130.

mothers.¹⁴⁹¹ The mid-day school meals for instance has been said to have the most far-reaching effect and which the Court has further mandated that quality food be supplied and not just food. The provisions of these meals have positively affected the right to education by promoting children's regular attendance at schools.¹⁴⁹²

The Supreme Court's beneficial construction of constitutional provisions in its PIL jurisdiction in the above manner enabled it to overcome objections to its competence to adjudicate on the enforceability of ECS rights contained in Part IV of the Constitution.¹⁴⁹³ The right to health was also upheld by the apex court in *Paschim Banga Khet Majoor Samity v. State of West Bengal*,¹⁴⁹⁴ as an integral part of the right to life. With this case and other ones above, the Court has been enforcing ESC rights provisions in the Indian Constitution indirectly, which are declared not to be enforceable.

It is to be noted that in spite of the fact that there are the Directive Principles of States Policy provisions in the 1999 Constitution (as Chapter II copied from India) which incorporates ESC rights, coupled with social economic rights provisions contained in the African Charter, which has been incorporated into the Nigerian laws, the Nigerian judiciary has not been able to use these for the advantage of the poor as in India and has held that one cannot resort to the provisions of the Charter as a launch pad for enforcing the provisions of Chapter II.¹⁴⁹⁵

4.2.2.6 Court's supervision of its own orders

In the ordinary course, the manner of enforcement of a court order depends on the very nature of the order in question. The decisions and consequent orders given in respect of cases are either declaratory or mandatory. Declaratory orders and judgments are by way of affirmative actions, without consequential orders or directions to State authorities, but are binding and have to be complied with by anybody or authority¹⁴⁹⁶ in accordance with Article 142(1) of the Indian Constitution which makes decrees or orders passed by the Supreme Court enforceable throughout the territory of India in a manner as may be prescribed by or under any law made by Parliament. Article 144 further provides that 'All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.' The acceptance and implementation by State authorities have to be awaited.¹⁴⁹⁷

¹⁴⁹¹ Ibid at p. 131.

¹⁴⁹² Ibid.

¹⁴⁹³ See S. Muralidhar (2002), op. cit. p. 3.

¹⁴⁹⁴ (1996) 4 SCC 37.

¹⁴⁹⁵ See Supreme Court's decision in *Abacha v. Fawehinmi*, [2001] 6 N.W.L.R. (Pt.660) 228, to the effect that the African Charter cannot be superior to the Constitution and as such, anything not permitted under our Constitution cannot be enforced through the African Charter. This is in view of the fact that the Supreme Court held earlier in *Ogugu v. The State*, [1994] 9 N.W.L.R. (Pt.366) 1, that the provisions of the African Charter are enforceable in the same manner as those of Chapter IV of the 1979 Constitution.

¹⁴⁹⁶ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006) p. 243.

¹⁴⁹⁷ See S. Muralidhar (2002), op. cit. p. 3.

Mandatory orders give specific directions that must be complied with by those affected by the order of court,¹⁴⁹⁸ but the implication of Article 142(1) is that enforcement of court orders may not be automatic at all times, as orders of courts both declaratory and mandatory may have to depend on the executive for execution. Thus, the fact that orders made by the Court in PIL cases are not self-executing and have to be enforced through State agencies who are not favourably disposed to the judicious execution of such orders in most cases and in fact do not actively cooperate with the court in that task, creates a challenge for the court in view of the sometimes far-reaching implications of such orders, which deemed that the purpose of PIL would remain unachieved if the orders of courts cannot be enforced.¹⁴⁹⁹

It was further reasoned by the Court that the consequences of non-implementation of its orders by relevant State agencies would not only lead to a denial of effective justice to the disadvantaged groups on whose behalf the particular action is brought but that it would also have a demoralizing effect and loss of faith by the people in the capacity of the court to deliver justice in PIL.¹⁵⁰⁰ 'The question then arises as to how the orders made by the Court in PIL can be enforced.'¹⁵⁰¹

In some cases, the Court on its own could supervise the implementation of orders and has left the possibility for the petitioner(s) to come back to court in case of non-implementation.¹⁵⁰² In this way, petitioners 'and interested parties return to the Court periodically, generally every two to three months, to report on implementation and request new orders',¹⁵⁰³. The Court has however found it a great difficulty to monitor or effectively supervise implementation in remote places.¹⁵⁰⁴ This challenge of enforcement of orders led the court to devise a means of securing its own orders by appointing monitoring agencies.¹⁵⁰⁵ In *Sheela Barse v. State of Maharashtra*,¹⁵⁰⁶ concerning the protection for women in police custody, a female judicial officer was appointed to visit the police lock-ups at regular intervals to monitor the situation and report to the High Court on the level of compliance with the order of court.

This practice was borne out of the general apathy displayed by the executive to act on the orders of court and have made the court sometimes spell out plans of action including the time frame within which such have to be complied with.¹⁵⁰⁷ In *Bandhua Mukti Morcha v. Union of India*,¹⁵⁰⁸ for instance, the court did not only declare the law in that case but also issued a series of directions for compliance by State authorities. The

¹⁴⁹⁸ Ibid.

¹⁴⁹⁹ See Bhagwati, P.N., op. cit. pp. 576-7.

¹⁵⁰⁰ Ibid.

¹⁵⁰¹ Ibid.

¹⁵⁰² See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 164.

¹⁵⁰³ See Sandra Fredman, op. cit. p. 128.

¹⁵⁰⁴ Ibid See *Sanjay Suri v. Delhi Administration*, 1988 AIR 414, this concerns monitoring of a jail.

¹⁵⁰⁵ See Bhagwati, P.N., op. cit. p. 577.

¹⁵⁰⁶ 1983 A.I.R. 378 (S.C.) cited in Bhagwati, P.N., op. cit. p. 577.

¹⁵⁰⁷ See S. Muralidhar (2002), op. cit. p. 3.

¹⁵⁰⁸ Supra, cited in S. Muralidhar (2002), op. cit. p. 3.

court then proceeded to monitor the implementation of these directions, an exercise which continues till the present date.¹⁵⁰⁹

In another case of *Bandhua Mukti Morcha v. Union of India*,¹⁵¹⁰ concerning labour matters, the Supreme Court gave detailed directives concerning actions to be taken on the welfare of the quarry workers and appointed the Joint-Secretary in the Ministry of Labour in order to secure implementation of the directive of court and requested him to visit the quarry after three months and ascertain compliance or otherwise with the directives of court. It that case the court stressed that the affirmative schemes framed in public interest litigation sometimes require detailed administration under constant judicial supervision over protected periods. This was premised on the fact that the lives of large sections of people, who have no voice in decisions, are shaped and ordered by mandatory Court action expanding into the future. And that public approval and consent assume material importance in its successful implementation.¹⁵¹¹

The implementation methodology that the court adopts in each case will depend on the type of directions given and it has thus become essential for the Court to pay due attention to the particular circumstances of each case, including the likelihood of compliance with orders of court and including the degree of response from the State agency on which the implementation lies.¹⁵¹² Thus the court does not adopt a single approach in the implementation strategy of its orders. In some cases, the court may build into its directions a forewarning, in the form of a threat outlining the consequences that would follow the disobedience of its order.¹⁵¹³ In *M.C. Mehta v. Union of India*¹⁵¹⁴ the court warned that a violation of its order would invite action for contempt of court, while in *T.N. Godvarman Thirumulpad v. Union of India*,¹⁵¹⁵ the court had to wield the big stick by committing for contempt, erring state officials who were found frustrating the implementation of its orders.¹⁵¹⁶

In PIL cases unlike the ordinary civil suits, the court also has the practice of not disposing of matters by one-off judgments. In such situations, the court passes a series of short orders and sees to their effective implementation before a final judgment is handed down in the matter.¹⁵¹⁷ This methodology has been termed by the court a ‘continuing *mandamus*’.¹⁵¹⁸ At the post-judgment stage, the court sometimes retains the

¹⁵⁰⁹ Ibid, where the author cited the case of *Bandhua Mukti Morcha v. Union of India* (2000) 10 SCC 104 as an example, where a recent direction was given.

¹⁵¹⁰ Supra cited in Bhagwati, P.N., op. cit. p. 577.

¹⁵¹¹ Ibid.

¹⁵¹² See *Bandhua Mukti Morcha v. Union of India* (supra).

¹⁵¹³ See S. Muralidhar (2002), op. cit. p. 3.

¹⁵¹⁴ Supra, cited in S. Muralidhar (2002), op. cit. p. 3.

¹⁵¹⁵ (1998) 9 SCC 672 cited in S. Muralidhar (2002), op. cit. p. 3.

¹⁵¹⁶ In that forestry case, high-profile officials of ‘the State of Maharashtra were committed for contempt for granting permission for saw-mills to operate in forest areas against the orders of the Court. They were each sentenced to one month’s imprisonment.’ See Sandra Fredman, op. cit. p. 128.

¹⁵¹⁷ See S. Muralidhar (2002), op cit p. 3.

¹⁵¹⁸ See *Vineet Narain v. Union of India* (1998) 1 SCC 226 at 243 cited in S. Muralidhar (2002), op. cit. p. 3.

case file for the purpose of monitoring compliance with its orders.¹⁵¹⁹ It is thus possible in a public interest litigation matter for instance, where detailed guidelines are laid down in the main judgment to have the implementation of the directions monitored for a period of time after the main judgment.¹⁵²⁰ This means that in PIL cases, the successful implementation of orders of court largely depends on the duration of stages involved in implementation of the particular directions of court and the degree of success from one stage to another.¹⁵²¹

As a result of this lofty way the courts give detailed directions in specific PIL matters as the circumstances and justice of the case may require, it has been commented that: '*No particular aspect of Indian public interest litigation, perhaps, is more remarkable than the minutiae of administrative detail' in which the courts have found it proper to become embroiled in their search for justice.*'¹⁵²²

The practice by Court of supervising the implementation of its own orders apart from achieving effective remedies to the disadvantaged sections of society, who in most cases would not have been able to get the orders of court enforced owing to the strong likelihood of disobedience by the State authorities¹⁵²³ and the elites in connivance with the State agencies, the judicial appointment of agencies to monitor State institutions have put them on their toes and spurred them on for better performance.¹⁵²⁴

Other jurisdictions have found this practice by India's PIL worthy of emulation. The decision of the Constitutional Court of South Africa in *Government of the Republic of South Africa v. Grootboom*,¹⁵²⁵ for instance has been criticized for not imposing a time limit on the State's actions in regard to its housing scheme by urgently putting in place a programme that will make provision for those in desperate need. This situation was said to have led the government to engage in delay and lukewarmness in meeting very basic needs of the poor, such that even two years after the judgment was delivered it has not been fully complied with.¹⁵²⁶ The Court was further criticized for not retaining the case in order to monitor the State's compliance with its obligations in respect of the provision of housing and through its order by appointing the Human Rights Commission to report back to it on State compliance.¹⁵²⁷ This failure would necessitate the matter to be litigated all over again, in order to bring the government to action, which will further result in a waste of time and expense.¹⁵²⁸

¹⁵¹⁹ See S. Muralidhar (2002), op cit p. 3.

¹⁵²⁰ Ibid, see *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416 (main judgment) where detailed guidelines concerning arrest were specified, compliance with the directions of court was monitored till six years after the main judgment. 'For a sampling of subsequent orders see those reported in (1999) 7 SCALE 222; (2000) 5 SCALE 353 and (2001) 7 SCALE 481' See S. Muralidhar (2002), op. cit. p. 3.

¹⁵²¹ See *Bandhua Mukti Morcha v. Union of India* (supra).

¹⁵²² See Peiris, G. L., op. cit. p. 75.

¹⁵²³ See S. Muralidhar (2002), op. cit. p. 3.

¹⁵²⁴ *Sheela Barse v. State of Maharashtra*, (supra).

¹⁵²⁵ 2001 (1) SA 46 (CC).

¹⁵²⁶ See David Bilchitz, op. cit. pp. 150 and 151.

¹⁵²⁷ Ibid.

¹⁵²⁸ Ibid.

In a manner that is similar to the practice of PIL in India, the Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, in Article 8, provides for a follow-up to the views of the Committee on Economic, Social and Cultural Rights, under which the State party can be required to give, preferably within a period of six months a written response, including information on any action taken in the light of the Views and recommendations of the Committee. The Committee may further invite the State Party to submit further information about any measures the State Party has taken in response to its Views or recommendations.¹⁵²⁹

In Nigeria which practises a presidential form of government, with the Constitution separating the powers of the three organs of government - legislature, executive and the judiciary¹⁵³⁰ - with the executive being responsible for the execution and maintenance of the Constitution and all laws,¹⁵³¹ the enforcement of court orders in respect of fundamental rights unlike the Indian position wholly depends on the cooperation of the executive, although the court can mete out punishment for contempt.¹⁵³² It therefore follows that Nigeria needs an activist judiciary to be able to go the way of the Indian judiciary in PIL, both in terms of innovative construction of the Constitution and radical procedural liberalization that will throw open the gate of justice to the poor and the deprived.¹⁵³³

¹⁵²⁹ See Article 8 bis (2) and (3) of the Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights annexed to A/HRC/8/WG.4/3 OF 25 March 2008.

¹⁵³⁰ See Sections 4, 5 and 6 of the 1999 Constitution.

¹⁵³¹ See *Ekeocha v. The Civil Service Commission of Imo State & Ano.* (1981) 1 N.C.L.R. 154.

¹⁵³² See Order 6 rule 2 of the Rules which provides for committal proceedings for the contempt of a party disobeying its order.

¹⁵³³ 'Judicial activism can take many forms. At one level, it may take the form of simply ensuring that judges have the necessary freedom of action-freedom to choose alternative courses of action.' For example power of the apex court to reverse its earlier decision, which according to Justice Bhagwati, is "technical activism." See Bhagwati, P.N., op. cit. p. 562 -3. 'Juristic activism is concerned as well with the creation of new concepts, irrespective of the purposes which they serve.' See Bhagwati, P.N., op. cit. p. 565. Activist position can be as a result of the judiciary's response to the socio-economic and sometimes political problems plaguing a country at a given time. See Hon. Kayode Eso (1990), op. cit. p. 59. Justice Bhagwati of India has asserted that no matter how the judiciary pretends, judicial activism is an undeniable feature of the judicial process in a democracy and that the only relevant question is what should be the degree and extent of judicial activism permissible to a judge. He added that if we analyze the true nature of judicial function, it becomes apparent that judicial activism is an essential part of it no matter the degree or extent. See Bhagwati, P.N., op. cit. p. 562A former Justice of the Supreme Court of Nigeria, who has been a frontline advocate of the judicial activism in Nigeria and has contended that there was no restriction on the powers of the judiciary under the Constitution except where the Constitution specifically excluded some matters from being justiciable and queried that 'what further green light does the judiciary need to assume an activist role in an activist society?' See Hon. Kayode Eso (1990), op. cit. p. 66. The Jurist further queried that 'in the context of Nigeria of today where both the Executive and the Legislature take activist stance, could it ever be in the interest of the judiciary to make a gradual approach to justiciable issues?' He queried further, 'Is it in the interest of the country to be content with only being liberal in specific cases rather than take an activist stance in matters within its exclusive prerogative?' See Hon. Kayode Eso (1990), op. cit. p. 66.

4.2.3 Criticisms against judicial intervention in PIL

Notwithstanding the many positive aspects of PIL and the level of success recorded by it as examined above, the judicial intervention in a relatively wide range of issues has raised debate among other issues, concerning the competence and legitimacy of the judiciary delving into areas which have been adjudged reserved for other organs of government within the principle of the separation of powers.¹⁵³⁴

It has been argued for instance that PIL in practice tends to narrow the divide between the role of the various organs of the government and that the Court has sometimes even obliterated the dichotomy between law and policy, for which reason PIL has been said to have invited controversy principally.¹⁵³⁵ The example of *M.C. Mehta v. Union of India*,¹⁵³⁶ was cited where the Court requested the central government to indicate what steps it had taken so far with respect to the protection of the environment since the coming into effect of the Environmental Protection Act 1986, in view of the decline in the quality of the environment and that the government was directed to lay before it, national policy if any, drawn up for the purpose of protecting the environment. The judiciary has thus been accused of acting outside its jurisdiction.¹⁵³⁷

The Supreme Court has also been accused of taking over legislative and executive functions by involving itself in policy making.¹⁵³⁸ Some of the directions given by the Court, such as the directions on the protection of women in police detention,¹⁵³⁹ principles and norms for giving a child in adoption to foreign parents,¹⁵⁴⁰ the direction that an Act should be brought into force by a given date,¹⁵⁴¹ principles governing the duration of the inquiry and pre-trial detention in cases of offences committed by children under 16¹⁵⁴² and parameters in assisting the victims of rape in dealing with complaints.¹⁵⁴³

The court has been accused of inability to effectively supervise the implementation of its own orders.¹⁵⁴⁴ This has resulted in challenges on legitimacy, since the non-compliance with a declaratory order of court may be perceived as undermining the

¹⁵³⁴ See further, Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 159.

¹⁵³⁵ Ibid at p. 5.

¹⁵³⁶ Supra.

¹⁵³⁷ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 15.

¹⁵³⁸ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 159.

¹⁵³⁹ *Sheela Barse V. State of Maharashtra*, (supra) See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 162.

¹⁵⁴⁰ *Lakshmi Kant Panley v Union of India* (supra).

¹⁵⁴¹ *Lakshmi Kant Panley v Union of India* (supra).

¹⁵⁴² *Sheela Barse V. Union of India* (supra).

¹⁵⁴³ See Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 162, where the issues are discussed and the cases cited in support.

¹⁵⁴⁴ Ibid.

Court's authority¹⁵⁴⁵ and thereby destroy the credibility of the judiciary. Also a concern has been expressed on the appropriateness of the use of contempt power as a valid way of ensuring compliance with the orders of court in the face of the practical problems presented by lack of resources in India.¹⁵⁴⁶ However, the courts are not oblivious to the resource issue, as they have constituted expert bodies from which they seek assistance on the resource implications of their decisions and these bodies are accountable to the courts.¹⁵⁴⁷

Another concern is about the sustainability of the court's practice of monitoring the implementation of its directions, since in most cases it takes a long time for such implementation to be completed. It was argued that this facilitates active engagement in the subject of litigation by the State with the civil society groups.¹⁵⁴⁸ It has been stressed however that it is imperative that there should be a degree of both continuity and consistency in the Court's approach to this, and that if this is not sustained, as it is sometimes not, the gains of judicial intervention may be lost.¹⁵⁴⁹

PIL has further been criticized on the basis that institutional support has proved to be neither consistent nor stable, such that the level of progress of the public interest litigation movement depends largely on the attitude of the judges.¹⁵⁵⁰ It was argued further that legal framework for PIL is lacking and that the practice of treating letters as writ petitions is uncommon, as the courts still largely insist on writs. Added to the criticism is that the overall objective of PIL of improving access to justice for the disadvantaged sections of the population has been undermined by the practice of hearing cases associated with prominent names while similar petitions brought by non-influential individuals have been rejected.¹⁵⁵¹ On the issue of initiation of PIL cases by influential people, the courts have been enjoined to ensure that those who already have political power do not bring PIL under their captivity.¹⁵⁵²

PIL has also been accused of lacking a format guiding the filing of petitions and that this has resulted in frivolous petitions burdening the courts, with the consequent wasting of precious judicial time. This was also said to have the negative effect of preventing the

¹⁵⁴⁵ See S. Muralidhar (2002), op. cit. p. 6.

¹⁵⁴⁶ Ibid.

¹⁵⁴⁷ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 264.

¹⁵⁴⁸ Ibid.

¹⁵⁴⁹ See S. Muralidhar (2002), op. cit. p. 6.

¹⁵⁵⁰ See Asia-Pacific Human Rights Network, Collective Rights in India: A Re-assessment, <<http://www.hrdc.net/sahrdc/hrfeatures/HRF36.htm>> accessed 30 October 2007; see also S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 258, where the author stated that 'the decisions in the PIL jurisdiction also calls for critical examination for their political and class biases.' According to the author, the courts are frequently petitioned by resident welfare associations in urban centres in PIL demanding ejection of 'illegal encroachments' by slum dwellers and their petitions often succeed.

¹⁵⁵¹ Ibid.

¹⁵⁵² See Sandra Fredman, op. cit. p. 148.

court from paying deserved attention to genuine ones.¹⁵⁵³ PIL has also been alleged to have been hijacked by people who are self-serving, either for agitating private grievances in the guise of public interest¹⁵⁵⁴ or for using it for publicity purposes,¹⁵⁵⁵ rather than serving the public interest.¹⁵⁵⁶ These it was argued have earned PIL negative appellations such as "publicity interest litigation", "private interest litigation", "politics interest litigation", and even "paisa income litigation",¹⁵⁵⁷ with a call for regulating the exercise of the writ jurisdiction.¹⁵⁵⁸ The necessity to control some of the abuses associated with PIL has led to the proposition of a private bill¹⁵⁵⁹ in 1996 but it also lapsed. It has been suggested that if a petitioner brings an action in bad faith, he must be imprisoned and made to pay damages.¹⁵⁶⁰

Another criticism is that judicial approach in PIL cases sometimes lack uniformity.¹⁵⁶¹ This has been attributed to the fact that the Supreme Court of India does not sit in one chamber in most cases to hear a particular matter and instead sits in benches of two to three judges, such that PIL cases which are retained for monitoring may be treated differently by successive judges who were not part of the initial bench which gave the orders.¹⁵⁶² The court has therefore been called upon to pay attention to this.¹⁵⁶³

The Courts have however been criticized for not giving recognition to the rights of urban slum-dwellers in litigation based on urban development by environmentalists, middle-class property owners and town planners, thus resulting in the eviction of large number of people: over 40 million.¹⁵⁶⁴ Added to this is that the promise of the government to rehabilitate the evicted poor is not usually fulfilled and when relocated, they are often given 'unserviced sites that are not accessible to schools or works and are further required to pay for a piece of land.'¹⁵⁶⁵ The Court has therefore been advised to be very vigilant in granting access to those claiming to be acting in the public interest so

¹⁵⁵³ See Jasper Vikas Gorge, Social Change and Public Interest Litigation India, <<http://india.indymedia.org/en/2005/03/210205.shtml>> accessed 6 May, 2007.

¹⁵⁵⁴ See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 15.

¹⁵⁵⁵ Such that issues which served as the use of PIL for access to justice for the poor are no longer the ones occupying PIL in courts. See Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 266.

¹⁵⁵⁶ See X, Public Interest Litigation, http://www.ebc-india.com/lawyer/articles/2005_5_1.htm accessed 15 October 2007.

¹⁵⁵⁷ Paisa as used in the context means wealth or money, i.e. denoting PIL as a money making venture. Ordinarily, paisa means the basic unit of the Indian money, rupee. One rupee is equal to 100 paise (plural). See the Free Dictionary, Paisa, <<http://www.thefreedictionary.com/paisa>> accessed 28 May 2008.

¹⁵⁵⁸ Ibid.

¹⁵⁵⁹ Public Interest Litigation (Regulation) Bill 1996 which was tabled in one of the legislative houses. See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 264.

¹⁵⁶⁰ Ibid at p. 265.

¹⁵⁶¹ Ibid at p. 263.

¹⁵⁶² Ibid.

¹⁵⁶³ Ibid.

¹⁵⁶⁴ See Sandra Fredman, op. cit. p. 143.

¹⁵⁶⁵ Ibid.

as not to in turn ‘replicate disparities in power and economic position in the wider society’ in PIL. This has the consequence of the elites drowning or silencing the voices of the poor.¹⁵⁶⁶

On the other hand, apart from some supportive arguments already noted above, several other arguments have been deployed in favour of judicial intervention, especially on the grounds that the larger perspective of the development of the law and of healthy democratic practices that reinforces accountability may explain the desirability of such intervention.¹⁵⁶⁷ ‘Also positive human rights duties are essential to protect the basics of democracy.’¹⁵⁶⁸

In *Bandhua Mukti Morcha v. Union of India* (supra), the Court sought to justify judicial intervention in executive functions by stating that, in adjudicating on PIL matters, the court does not do so in a confrontational manner or with a view to usurp executive authority but its attempt is only to ensure the observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. And that in effect the Court is thus merely assisting in the realization of the constitutional objectives.¹⁵⁶⁹

Justice Bhagwati himself has defended the activist stance and seeming encroachment into legislative function by the Indian judiciary by arguing that it is inescapable that judges do make laws and engage in policy formation, although in a surreptitious manner, in its interpretative functions. According to him, there is a myth strongly nurtured by the Anglo-Saxon tradition and propagated by many jurists that judges do not make law, but that this proclaimed function of the judiciary hides the real nature of the judicial process. And that this has been deliberately constructed in order to insulate judges against vulnerability to public criticism and to preserve their image of neutrality, which is regarded as necessary for enhancing their credibility.

Bhagwati further added that it also assists judges to escape accountability for their decisions as they can always plead helplessness (even if the law they declare is unjust) that it is the law made by the legislature, which they have no choice than to give effect to.¹⁵⁷⁰ It is however an open secret that judges make law as one of the sources of laws in most jurisdictions including Nigeria, which includes case law - which is judge made.¹⁵⁷¹ For example Article 141 of the Indian Constitution provides that ‘The law declared by

¹⁵⁶⁶ Ibid at 137.

¹⁵⁶⁷ See S. Muralidhar (2002), op. cit. p. 5.

¹⁵⁶⁸ See Sandra Fredman, op. cit. p. 102.

¹⁵⁶⁹ Supra at para 6. By the same token, Justice Bhagwati, also had this to say in support of judicial intervention: ‘Let me make it clear that when judges are granting relief they are not acting as a parallel government. They are merely enforcing the constitutional and legal rights of the underprivileged and obligating the Government to carry out its obligations under the law. The poor cannot be allowed to be cheated out of their rights simply because those who should act do not act, act partially, or fail to monitor what they are doing.’ See Bhagwati, P.N., op. cit. p. 576.

¹⁵⁷⁰ See Bhagwati, P.N., op. cit. pp. 562 -3.

¹⁵⁷¹ See Asein, John Ohireime (1998), op. cit. p. 23.

the Supreme Court shall be binding on all courts within the territory of India' and its orders and decrees enforceable throughout India.¹⁵⁷²

Furthermore, what the judiciary in India is doing in PIL is not more than is done in Common law, made by judges, where judges invoke existing law to create new law under the guise of interpreting it.¹⁵⁷³ This is no more than judicial law making, which judges do not generally admit.¹⁵⁷⁴ Even the rules of precedent do not fetter judges' liberty to decide matters in a particular way whenever they are free to manoeuvre under the rules, (e.g. when the precedent is from a coordinate court or a lower one) and as such a judge takes into consideration choosing between notions of justice, convenience, public policy and morality and in some cases take into consideration the opinions of judges in other jurisdictions.¹⁵⁷⁵

However, some of the criticisms as stated above are not substantiated to drive home the points being made and this also affects their being judiciously tackled herein.

The view has however been expressed that the court cannot be a substitute for 'recalcitrant governments nor can replace political activity, but that what the court can do, however, is to act as a catalyst for the democratic pressures which ultimately make recalcitrant governments to act.'¹⁵⁷⁶ This role, PIL is said to be fulfilling by giving access to all interested parties which facilitates genuine conversation among the parties on equal terms.¹⁵⁷⁷

However, other forceful support for judicial intervention is premised on its positive implications in the area of social economic rights¹⁵⁷⁸ which are crucial to the disadvantaged sections of the population and will greatly contribute to their empowerment and to lifting them out of poverty.

It was argued that judicial intervention has acted as a catalyst of change in the area of law and policy in India, and that many positive changes in law and policy in respect of education generally and primary education in particular have their origin in the Supreme Court's decision of *Unni krishman J.P. v. State of Andhra Pradesh*,¹⁵⁷⁹ (supra) concerning the challenge to the validity of certain items of State legislation regulating the charging of fees by private educational institutions and prohibiting the charging of 'capitation fees'.¹⁵⁸⁰ The fees which are not regarded as tuition fees have been criticized

¹⁵⁷² By Article 142 (1), decrees and orders passed by the apex Court shall also be enforceable throughout the territory of India.

¹⁵⁷³ See Glanville Williams (1982), *Learning the Law*, Stevens & Sons, London, pp. 29 -30.

¹⁵⁷⁴ Ibid at p. 92.

¹⁵⁷⁵ Ibid.

¹⁵⁷⁶ See Sandra Fredman, op. cit. p. 148.

¹⁵⁷⁷ Ibid.

¹⁵⁷⁸ See S. Muralidhar (2002), op. cit. p. 4.

¹⁵⁷⁹ Ibid. pp. 4-5. See the case of *Unni krishman J.P. v. State of Andhra Pradesh* which was instituted to challenge the State of Andhra Pradesh (A.P.)'s A.P. Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act 1983.

¹⁵⁸⁰ "Capitation fees" are very high level of fees charged legally, but most often illegally, in private colleges for student admissions. Capitation fees were banned by the Indian government in 1994 but the practice nevertheless continues. See Jandhyala B.G. Tilak, "Emerging Trends and Evolving Public

for creating a class bias and for providing access to education on the basis of the economic status of guardians rather than on merit.¹⁵⁸¹ The decision of the court in that case in 1993 declared “capitation fess” illegal.

Judicial intervention is also said to have greatly assisted in developing benchmarks and performance indicators in several areas of social economic rights in India.¹⁵⁸² The decision in *Paschim Banga Khet Majoor Samity v. State of West Bengal*,¹⁵⁸³ (supra) for instance delineates the right to emergency medical care for accident victims as forming a core minimum of the right to health, while the orders in *People’s Union for Civil Liberties v. Union of India*,¹⁵⁸⁴ is instrumental to the right of access by those living below the poverty line to food supplies as forming the core non-derogable minimum that is essential to preserve human dignity. The decision in *M.C. Mehta v. State of Tamil Nadu*¹⁵⁸⁵ has laid down benchmarks for the government in eradicating child labour by directing the State to ensure that an adult member of a family is given employment in hazardous jobs in replacement of the child that works there.

It was further argued that the decision in *Vishaka v. State of Rajasthan*,¹⁵⁸⁶ (supra) for instance has been able to bring into public discourse, the issue of sexual harassment of women in the workplace which had otherwise been completely ignored by the executive and the legislature.¹⁵⁸⁷ And that the positive implication of such decision is that it becomes immediately useful as a law declared by the Supreme Court to demand recognition and enforcement of the right of access to judicial redress against the injury caused to woman in the workplace.¹⁵⁸⁸ The aggregate of all these principles have been said to have led to a valuable development of jurisprudence of human rights which accords with the development of the international law.¹⁵⁸⁹ Cases concerning environmental issues have been said to have enabled the court to develop and apply the ‘polluter pays principle’,¹⁵⁹⁰ the precautionary principle¹⁵⁹¹ and the principle of restitution.¹⁵⁹²

Policies in India”, in Philip G. Altbach (ed.) (1999), *Private Prometheus: Private Higher Education and Development in the 21st Century*, Greenwood Press, Westport, U.S.A. pp. 120, 123, 124 and 132. Before the decision in *Unni Krishnan J.P. vs. State of A.P.* (supra), some States in India had enacted legislation banning the charging of such fees; these are, the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act 1984; Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act 1987; Tamil Nadu Educational Institutions (Prohibition of Collection of Capitation Fee) Act 1992.

¹⁵⁸¹ See Jandhyala B.G. Tilak, “Emerging Trends and Evolving Public Policies in India”, in Philip G. Altbach (ed.) (1999), op. cit. p. 124.

¹⁵⁸² See S. Muralidhar (2002), op. cit. p. 4.

¹⁵⁸³ Ibid at p. 5.

¹⁵⁸⁴ Supra. Ibid.

¹⁵⁸⁵ (1996) 6. SCC 772.

¹⁵⁸⁶ See S. Muralidhar (2002), op. cit. p. 5.

¹⁵⁸⁷ Ibid.

¹⁵⁸⁸ Ibid.

¹⁵⁸⁹ Ibid.

¹⁵⁹⁰ *S. Jagannath v. Union of India* (1997) 2 SCC 87 cited in S. Muralidhar (2002), op. cit. p. 5.

¹⁵⁹¹ See *Vellore Citizens’ Welfare Forum v. Union of India* (1996) 5 SCC 647 cited in S. Muralidhar (2002), op. cit. p. 5.

¹⁵⁹² See *In Re: Bhavani River-Shakti Sugars Ltd* (1998) 6 SCC 335 cited in S. Muralidhar, op. cit. p. 5.

On some of the criticisms noted above such as the inability of the Court to implement its own orders, it is crucial to note that the court is employing internal mechanisms to address this. For instance, in *Bandhua Mukti Morcha v. Union of India*,¹⁵⁹³ the Court was enjoined to tread with caution in treating PIL petitions and to refrain from making unenforceable orders as the consequences of disobedience can seriously undermine the integrity of the court. Also on the abuse of the PIL, especially filing of frivolous petitions and the consequent waste of time of the court, the court has been enjoined to restrict the free flow of such cases, such that traditional litigation will not suffer and the court will not be burdened with administrative and executive duties instead of dispensing justice.¹⁵⁹⁴

It is important to note further that as part of the self-regulating mechanism, the court is usually reluctant to intervene in areas that it deems executive or legislative policy, not withstanding that such petition may have ESC rights implications.¹⁵⁹⁵ Consequently, in the recent case of *BALCO Employees' Union v. Union of India*,¹⁵⁹⁶ the court declined to intervene in the decision of the government to divest its shares in a public sector undertaking on the ground that this was in the realm of economic policy of the government and that the court was plainly not equipped to evaluate its appropriateness. Also, in some cases the Supreme Court has realized the need to apply caution in its remedial action and refrain from encroaching on functions of other organs of the government.¹⁵⁹⁷

However, it is to be noted that no system is immune to flaws or challenges. The PIL in the U.S. for instance is susceptible to abuses in a number of ways¹⁵⁹⁸ and equally, there can be frivolous class actions, which have proved to be a serious concern for the courts in the past.¹⁵⁹⁹ There is the challenge of proliferation of class actions¹⁶⁰⁰ and that it is sometimes used as a tool for blackmail,¹⁶⁰¹ It has also been criticized for instance that the certification of a class by court usually brings the other party to the negotiation table which in most cases results in the settlement of enormous fees to class counsel and that

¹⁵⁹³ (supra) at 232 per Pathak, J ; see also See Justice .S.P. Bharucha, op. cit. p. VIII; see Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potentials and Problems", in B.H. Kirpal et al. (eds) (2001), op. cit. p. 16.

¹⁵⁹⁴ See *Sachidanand Panday v. State of West Bengal* (1987) 2 SCC 295 at 334 per Khalid J.

¹⁵⁹⁵ See S. Muralidhar (2002), op. cit. p. 5.

¹⁵⁹⁶ (2002) 2 SCC 333 cited in S. Muralidhar (2002), op. cit. p. 3.

¹⁵⁹⁷ In *State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla* S.C. (1) 11 April 1985) p. 1399 s.1 the court stated as follows "...the judiciary has to be extremely careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the Executive and the legislature." Also in *State of Himachal Pradesh v. Umed Ram Sharman* AIR 1986 S.C. p. 854 s. 29 the court stated that "Remedial action in public interest must be with caution and with limits" cited in Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, op. cit. p. 162.

¹⁵⁹⁸ For example by collusive agreement and precertification settlements with the defendants. See Thomas H. Justice, III, *Civil Procedure*, 36 Wash. & Lee L. Rev. 426 (1979) p. 426.

¹⁵⁹⁹ See X., *Developments in the Law: Class Actions*, Harv. L. Rev. 1318 (1975 – 1976) p. 1321.

¹⁶⁰⁰ See Marshal J. Rabiteau, *Abusive Class Actions: An Expanding Growth Industry*, 2001 WL 1505996 (N.L.C.P.I.), NLCPI-B-0901 p. 1. (Published by Westlaw, publication page and references are not available).

¹⁶⁰¹ See Mauro Cappelletti, op. cit. p. 679.

an action which ordinarily has no merit and a very slim chance of success if it proceeds to trial becomes a subject of serious consideration for settlement once there is certification of a class action.¹⁶⁰²

Some of the above reasons have made the underlying motives in most class actions to be regarded as money making, as certification of a class invariably leads to the class counsel being settled with mouth watering fees, while the consumers are exploited.¹⁶⁰³ But the associated abuses have not diminished the legitimacy of some of the class actions¹⁶⁰⁴ and the whole PIL model has been regarded as 'an extremely valuable instrument only if accompanied by adequate controls.'¹⁶⁰⁵ So, it is necessary for safety nets to be built into the Indian model, where none exist currently.

A caution has been given for instance that since the Indian PIL's jurisdiction has grown to cover various issues, that 'the balloon should not be inflated so much that it bursts' and that coupled with the abuses, it has been suggested that PIL be confined strictly to cases of protecting the poor and the socially disadvantaged.¹⁶⁰⁶ And that where the petitioner does not represent someone in that class, such should be denied access to the court and be made to go by the formal writ system, with the narrow rules of standing applicable.¹⁶⁰⁷ It has been recognized that this may be fraught with practical problems of how to sift out the cases appropriately.¹⁶⁰⁸ On the other hand, it is suggested that access be given to all parties, in order for the Court to hear all but with the special scrutiny of petitioners in environmental cases.¹⁶⁰⁹ This is premised on the danger of PIL being easily hijacked 'by well articulated and well-organized interest groups.'¹⁶¹⁰

Despite the challenges of PIL, the Supreme Court has been commended for interpreting the Constitution in a most innovative manner with the spirit of judicial activism.¹⁶¹¹ For this reason, the Supreme Court of India by reason of evolving a new jurisprudence of PIL has been adjudged by the people of the country as the 'last resort for the oppressed and the bewildered.'¹⁶¹² The several arguments in support of PIL and in favour of continued judicial intervention lends credence to 'the importance of having a virile judiciary that lives up to its primary role as guardian and enforcer of basic rights in a country where large sections of the population are denied access to survival rights and redress',¹⁶¹³ and 'has acquired new credibility with the people'.¹⁶¹⁴

¹⁶⁰² See Marshal J. Rabiteau, op. cit. pp. 2 and 3.

¹⁶⁰³ Ibid.

¹⁶⁰⁴ Ibid at p. 1.

¹⁶⁰⁵ See Mauro Cappelletti, op. cit. p. 669.

¹⁶⁰⁶ See Sandra Fredman, op. cit. pp. 141 and 146.

¹⁶⁰⁷ Ibid.

¹⁶⁰⁸ Ibid.

¹⁶⁰⁹ Ibid at p. 141.

¹⁶¹⁰ See Sandra Fredman, op. cit. p.139.

¹⁶¹¹ See M. N. Rao, *Judicial Activism*, at <<http://www.geocities.com/bororissa/jud.html>> accessed 10 July, 2007.

¹⁶¹² See Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 29 Int'l Committee Jurist Rev. 37 (1982) cited in Bhagwati, P.N., op. cit. p. 568.

¹⁶¹³ See S. Muralidhar (2002), op. cit. p. 6.

¹⁶¹⁴ See Bhagwati, P.N., op. cit. p. 568.

The people of India have continued hope in the judiciary which has been predicated on the general apathy demonstrated by the other arms of the government to efficiently address the issues of economic and social rights.¹⁶¹⁵ And that by taking up the citizen's concern about this indifference, the court provides the platform for the State and civil society to engage as active participants in the scheme for the realization of ESC rights.¹⁶¹⁶

On the whole, it has been said that 'PIL should not be judged by expectations it cannot fulfil, but instead be tailored to achieve what it was intended for.'¹⁶¹⁷

4.2.4 Conclusion

'One does not choose to be poor anymore than he chooses the race into which he is born, the religion in which he is educated, or his parental ancestry. None of these traits can be effectively dispelled or eradicated by society, and as a consequence, it becomes incumbent upon government to be sensitive to these conditions in legislative purpose so as not to stigmatize and demean a human being for possessing a trait which he is impotent to control or change. If it is the affirmative responsibility of government to guarantee that individual differences based on inherent traits are not to be the subject of favored or disfavored application of the laws, then classifications based solely upon wealth can never further any legitimate governmental objective.'¹⁶¹⁸

The legal profession has definitely advanced beyond the implied notion of yesteryear that the courts were available only for those who could afford them.¹⁶¹⁹ Based on the above discussion, it is clear that the Anglo-Saxon law cannot effectively address the challenge posed by the genuine concern for the fundamental rights and collective claims of the poor, which the Indian model of PIL has confronted by devising new procedures which made it easier for the disadvantaged to use the legal process and evolving new principles targeted at social justice.¹⁶²⁰ With the new efforts, justice is by and large no longer rationed or remains a commodity exclusively for the rich, a condition which is fundamental to keeping democracies.¹⁶²¹ Human rights are rights to be enjoyed by all persons by virtue of being human beings and its exercise should not be contingent upon means.¹⁶²²

It is necessary to address another issue here, that in view of the major challenge posed by cost to the poor in accessing justice in Nigeria as enumerated above, especially in

¹⁶¹⁵ See S. Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario", in Fons Coomans (ed.) (2006), op. cit. p. 264.

¹⁶¹⁶ See S. Muralidhar (2002), op. cit. p. 6.

¹⁶¹⁷ See Sandra Fredman, op. cit. p. 148.

¹⁶¹⁸ See Kreppel, Gary, op. cit. p. 285.

¹⁶¹⁹ See Weinstein, Jack B., op. cit. 658.

¹⁶²⁰ See Bhagwati, P.N., op. cit. p. 570.

¹⁶²¹ See G. Hazard, *Rationing Justice* 1 (1967) cited in Weinstein, Jack B., op. cit. p. 657.

¹⁶²² See Pierre-Henri Imbert, "Rights of the Poor, Poor Rights? Reflections on Economic, Social and Cultural Rights", in Adama Dieng (ed.) (1995), *Economic, Social and Cultural Rights and the Role of Lawyers*; - papers of the International Commission of Jurists, p. 94.

attending court sittings and transporting witnesses, it is recommended that in the PIL version to be adopted in Nigeria, Courts may be sitting in circuits¹⁶²³ at designated strategic places in the rural areas in order to bring the court nearer to the people and make access to justice very cheap and speedy. Although this is not a feature of the PIL in India, it will be fine-tuning that will give a major boost to arousing a consciousness of rights redress in the people in the rural areas, the majority of whom are poor and may still be challenged by the issue of cost, notwithstanding the noble features of the PIL in India. It will also make the courts system more effective, relevant and responsive to the needs of the local communities.

Whatever the challenges are, the Supreme Court has been able to use activism to achieve social justice and for expanding the frontiers of fundamental rights through the vehicle of PIL.¹⁶²⁴ It is evidenced from this work that rights empower the people to fight poverty. This Indian model is recommended for adoption in Nigeria, while the areas of challenges discussed in this work will be efficiently addressed as the local situation may permit.

4.3 INTRODUCTION OF AN ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISM

Alternative dispute resolution (hereinafter referred to as 'ADR') generally refers to the processes which 'are intended to solve disputes out of court, or by non-judicial devices.'¹⁶²⁵ ADR however now covers both non-judicial and judicial processes,¹⁶²⁶ such that the use of the word 'alternative', which ordinarily 'implies exceptional or secondary or even deviant in contrast with something that is normal or standard or ordinary',¹⁶²⁷ can no longer be regarded as strict, especially with increased cases of court sponsored ADR or court connected ADR.

The growing use of ADR has been associated with the fact that 'it is quicker, and cheaper, more accessible, more flexible, produces solutions which are more durable and preserves continuing relationships.'¹⁶²⁸ There is also the ground that 'adjudicators

¹⁶²³ Circuit court systems exist in several common law jurisdictions. Originally it meant a court that would hold sessions in multiple locations within its judicial district; the judge or judges would travel in a circuit in order to adjudicate cases across a wide area. Especially on the United States frontier, a judge might travel alone on horseback along with a group of lawyers. Abraham Lincoln was one such attorney who would ride the circuit in Illinois. In more settled areas, a stagecoach would be used. Eventually the legal caseload in a county would become great enough for a local judiciary. Most of these local judicial circuits have been thus replaced. See Wikipedia, Circuit Court, <http://en.wikipedia.org/wiki/Circuit_court> accessed 17 November 2007.

¹⁶²⁴ See Bhagwati, P.N., op. cit. p. 566.

¹⁶²⁵ See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, Mod. L. Rev. 282 (1993) p. 282.

¹⁶²⁶ Ibid.

¹⁶²⁷ See William Twining, *Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 Mod. L. Rev. 380 (1993) p. 382.

¹⁶²⁸ See Richard Ingleby, *Court Sponsored Mediation: The Case Against Mandatory Participation*, Mod. L. Rev. 441 (1993) p. 442. For instance, conciliatory justice for instance has been said to have the

themselves might be better aware of the environment in which such an episode has arisen and more capable to understand the parties' plight.¹⁶²⁹ This is in addition to the objective of providing alternative avenues for peoples' grievances to be ventilated by an independent body without necessarily having to resort to legal proceedings which are inaccessible, complex, expensive and prolonged.¹⁶³⁰ Litigants also are said to have been frustrated with traditional litigation owing to the said problems and this makes ADR attractive, as the formal system appeared incapable to providing 'the ideals of access to justice for all.'¹⁶³¹ As a result, ADR has been advocated for redressing human rights violations,¹⁶³² in addition to redressing rights violations through the ordinary courts.¹⁶³³

Since the late 1970s ADR developed as a result of the legal scholars and access-to-justice movement's search for alternatives to litigation in resolving disputes based on the problems of accessing justice,¹⁶³⁴ although 'supporting institutions for assisting parties in negotiations have developed in North America in the 1960s'.¹⁶³⁵ The access to justice movement did not however foreclose judicial process, but has in fact canvassed that it be made open to the entire population.¹⁶³⁶ The search produced non-contentious alternatives, such as conciliation and mediation.¹⁶³⁷ Indeed, the access to justice movement arose because of the observation that in practice courts are often costly and slow, intimidate and confuse parties by their formal procedures, may advantage parties with resources and experience and deliver outcomes that seem not to reflect the interests or values of any of the parties.¹⁶³⁸

capacity 'to preserve the relationship by treating the litigious episode as a provisional disruption, rather than a final break of the relationship.' This is particularly among neighbours, and those living in 'total institutions' such as schools, offices hospitals urban quarters and villages where the people are forced to live in daily contact. See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. pp. 289 and 290.

¹⁶²⁹ See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 289.

¹⁶³⁰ See Jean-Bernard Marie, "National Systems for the Protection of Human Rights", in Janusz Symonides (ed) (2003), pp. 266-267.

¹⁶³¹ See Cyril Glasser and Simon Roberts, *Dispute Resolution: Civil Justice and its Alternatives*, 96 Mod. L. Rev. 277 (1993) pp. 280 and 281; William Twining, op. cit. p. 380; Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship*, 56 Mod. L. Rev. 452 (1993) p. 452.

¹⁶³² The example of the Constitutional Court of South Africa was given, where the Court has constituted a committee of Justices which reviews the letters it receives, and that all letters do not necessarily end up in court as they can result in a number of outcomes. The committee as it may deem fit does refer authors of letters to appropriate institutions which might be able to provide needed assistance. See Budlender, Geoff, op. cit. p. 356.

¹⁶³³ See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 287.

¹⁶³⁴ See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. pp. 282 and 287; see also Cyril Glasser and Simon Roberts, op. cit. p. 277.

¹⁶³⁵ Simon Roberts, op. cit. p. 454.

¹⁶³⁶ See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 287.

¹⁶³⁷ Ibid.

¹⁶³⁸ See McEwen, Craig A.; Williams, Laura, *Legal Policy and Access to Justice Through Courts and Mediation*, Ohio St. J. on Disp. Resol. 865 (1997-1998) p. 866.

Furthermore, there is said to 'be substantial evidence that many people with legal needs or problems do not pursue them through the law at all,¹⁶³⁹ and that research evidence also suggests that parties are more likely to view mediation as "procedurally just" and satisfying when compared with adjudication or other settlement processes.'¹⁶⁴⁰

The involvement of government in ADR and its encouragement of people to settle have been seen as the government's desire to manage the costs of providing civil justice, with the possible growing volume of civil cases necessitating a call for the creation of more courts and judicial appointments¹⁶⁴¹ and 'as another way of intervening in dispute resolutions which has been largely realized through litigation formerly.'¹⁶⁴² However, the cost of access to justice has been enjoined not to be seen as a burden, but 'as the cost of democracy itself which must be happily borne by the society.'¹⁶⁴³

Under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN General Assembly Resolution 40/34 of 29 November 1985, informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, were recommended to be utilized where appropriate to facilitate conciliation and redress for victims of abuses of power.¹⁶⁴⁴ Also, under the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, Guideline 13, on the right of equal access to justice, the promotion of free access of the poor to tribunals and other dispute resolution mechanisms as a remedy against human rights violations was recommended.¹⁶⁴⁵ Under both the Declaration and Guidelines, informal mechanisms for the resolution of disputes were acknowledged as a platform for accessing justice, especially for the poor.

Justice itself has been described to 'entail empowerment of individuals to shape decisions about their own lives and conflicts on terms that are meaningful to them.' For this reason, it has been argued that 'the standards for decisions are not necessarily legal rights and entitlements, and the procedures for empowerment typically are informal rather than formal ones with procedural safeguards. From this viewpoint, the central issue of access to justice involves access to a process like mediation, not to courts. It is in mediation, in this view, where disputants presumably have the power to participate actively, and to decide outcomes and the criteria for them themselves'.¹⁶⁴⁶

¹⁶³⁹ Ibid. at p. 867.

¹⁶⁴⁰ See McEwen, Craig A.; Williams, Laura, op. cit. p. 867.

¹⁶⁴¹ See Cyril Glasser and Simon Roberts, op. cit. pp. 280 and 281; William Twining, op. cit. p. 380; Simon Roberts, op. cit. p. 452.

¹⁶⁴² See Simon Roberts, op. cit. p. 458.

¹⁶⁴³ See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 287.

¹⁶⁴⁴ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para 7, under access to justice and fair treatment sub-heading.

¹⁶⁴⁵ See Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies, Guideline 13 para 192.

¹⁶⁴⁶ See McEwen, Craig A.; Williams, Laura, op. cit. p. 866.

In the report of the Independent Expert on human rights and extreme poverty, alternatives to judicial measures, such as mediation, were recommended as mechanisms that must always be encouraged, provided that they are voluntary.¹⁶⁴⁷ The Independent Expert also recommended that mediation could be used to resolve both individual and collective disputes; the Expert however cautioned that human rights must be respected when mediation is used, and that it should not supplant recourse to the legal system.¹⁶⁴⁸ The Expert further stated that mediation must be conditional on full respect for human rights.¹⁶⁴⁹

The warning has also been sounded that in adopting the human rights-based approach in any given set of circumstances: among others, we should not rely upon unrealistic assumptions concerning the practical value of formal redress through legal processes and institutions,¹⁶⁵⁰ and that human rights should be seen as open-textured and flexible, and capable of policy application in diverse situations in ways not limited to adjudication in courts and tribunals.¹⁶⁵¹

The reasons for suggesting ADR for redress of human rights violations may not be unconnected with the fact that many of the cases of human rights violations are relatively straightforward, that resolution would not necessarily require complex court adjudication. Also, ADR is conceived as cheap both in terms of cost and time and that effective ADR, which is rights-based, will lead to increased access to justice for the poor.¹⁶⁵² Conciliation for instance has been said to provide more specific and rapid possibilities of remedying alleged violations than traditional legal proceedings, without loss of time, whereas legal proceedings sometimes do no more than compensate damage already suffered - the situation itself often irreversible.¹⁶⁵³

Such informal mechanisms of accessing justice only currently exists legally in a few states in Nigeria as noted earlier in this work under the treatment of legal aid, while in some other cases such mechanisms are not backed by law and thus lack the force of law. There is thus the need to institutionalize ADR throughout the country, because all rights violations need not necessarily end up in court. There are instances where securing an undertaking from the violator that such act will not reoccur or offer of amends, might be satisfying to the victim and even a genuine remedy; a sincere apology might be

¹⁶⁴⁷ See E/CN.4/2000/52, the second report of the Independent Expert on human rights and extreme poverty, para 109 p. 32.

¹⁶⁴⁸ Ibid.

¹⁶⁴⁹ Ibid.

¹⁶⁵⁰ See Bridging the gap between human rights and development: from normative principles to operational relevance, lecture by the United Nations High Commissioner for Human Rights - Mary Robinson at the World Bank, 3 December 2001.

¹⁶⁵¹ Ibid.

¹⁶⁵² See Jean-Bernard Marie, "National Systems for the Protection of Human Rights", in Janusz Symonides (ed) (2003), op. cit. pp. 269-270.

¹⁶⁵³ Ibid at pp. 269-270.

gratifying too. Of course there are situations where an apology or even a hug might not be sufficient, especially in cases of serious rights violations.¹⁶⁵⁴

4.3.1 Methodology

The types and institutional frameworks of ADR are varied and multicoloured.¹⁶⁵⁵ Some ADR processes are handled by administrative agencies, while in some others they are attached to the court and some jurisdictions have a combination of the two.¹⁶⁵⁶ The roles to be played by the administrative bodies and the courts in ADR processes are equally diverse. With respect to court-linked ADR,¹⁶⁵⁷ in some jurisdictions, mediation is a common feature in pre-trial conferences and the judge's role is that of mediation and settlement.¹⁶⁵⁸ In others, courts can refer parties to arbitration,¹⁶⁵⁹ but the arbitral decision may be challenged, with costs being imposed on the party who contests such decision in court and obtains no better result than the one by arbitration.¹⁶⁶⁰

Furthermore, in some other jurisdictions, courts can suggest mediation to the parties and parties can equally make a request for this,¹⁶⁶¹ while another variation is for private persons to be appointed as 'conciliateurs' (conciliators), by the judiciary with the

¹⁶⁵⁴ See note 539 A victim of rights abuse should therefore be at liberty to approach the courts in appropriate cases and not be coerced into compromising his/her claim.

¹⁶⁵⁵ See Cyril Glasser and Simon Roberts, op. cit. p. 278.

¹⁶⁵⁶ Ibid at p. 289. In Japan, for example, ADR devices are attached to both the courts and administrative agencies, and the court has set up its conciliatory board.

¹⁶⁵⁷ The ADR linked to the courts has been in response to the advocates of integration of ADR processes to the formal justice system. See Simon Roberts, op. cit. p. 458. Frank Sanders has been the proponent of the 'Multi-door Courthouse' in North America which has now served as the basis of the court linked ADR especially in the common law countries where parties are expected to consider it before opting for litigation. Ibid.

¹⁶⁵⁸ This is the case in Canada. See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 291.

¹⁶⁵⁹ In Nigeria, two states have court-linked ADR, Lagos State and Kaduna and thirdly the federal capital territory, Abuja. The Lagos State Judiciary pioneered the establishment of the ADR centre of the Lagos High Court; the Lagos Multi-Door Courthouse in June 2002, which is reputed to be the first court-connected ADR Centre in Africa. See The Lagos Multi-Door Courthouse, a pamphlet on the Lagos State Judiciary court-connected ADR centre, p. 4. The ADR centre is situated within the court premises and is a joint project by a private body - the Negotiation and Conflict Management Group (NCMG) and the Lagos State Judiciary. The ADR Centre can be used for any civil case and has 40 experienced hands which are drawn from various professions, including the judiciary-retired judges. See The Lagos Multi-Door Courthouse, a pamphlet on the Lagos State Judiciary court-connected ADR centre, p. 5. The court rules for the first time in the history of High Court Rules in Nigeria made elaborate provisions for Alternative Dispute Resolution (ADR). For example Order 39, Rule 4(3) of the Lagos State High Court Civil Procedure Rules 2004 makes provisions for the decisions reached at the Courts' ADR centre - The Lagos Multi-Door Courthouse. Order 25, provides for pre-trial conferences and scheduling, making specific reference in Rule 1(2)(C) to 'promoting settlement of the case or adoption of Alternative Dispute Resolution'. There is also another Multi-Door Courthouse in Kano, and an ADR centre in Abuja.

¹⁶⁶⁰ This can be found in some states in the U.S. See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 292.

¹⁶⁶¹ This can be found in Australia, see Richard Ingleby, op. cit. p. 444.

responsibility of meeting parties and trying to explore the possibility of arriving at a conciliation agreement, and they can hear testimonial evidence.¹⁶⁶²

However in some jurisdictions ADR is regarded as an essential ingredient of case management practice required to be adopted by judges. In that regard, the role of courts with respect to ADR may entail more than a suggestion of mediation to the parties, in order to achieve active case management. The judge is required for instance, to 'encourage the parties to co-operate with each other in the conduct of the proceedings', 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating their use of such procedure' and 'helping the parties to settle the whole or part of the case.' Where the objective of settlement is not achieved, the judge is to free the matter for trial.¹⁶⁶³

The ADR may also be modelled on the practice of administrative agencies, such as national human rights institutions as already noted above,¹⁶⁶⁴ with necessary powers of investigation, of compelling attendance of parties and make necessary decisions, which should be binding on the parties.¹⁶⁶⁵ This is because national human rights institutions are for the broad objective of protecting and promoting human rights and may perform a range of functions. These include dispute resolution through conciliation, mediation or adjudication, among others.¹⁶⁶⁶ The World Conference on Human Rights encouraged the establishment and strengthening of national institutions having regard to the Paris Principles recognizing 'the right of each State to choose the framework which is best suited to its particular needs at the national level'.¹⁶⁶⁷

In this regard, the type of ADR being proposed is the one in which the victim of human rights abuse can make use of the National Human Rights Commission of Nigeria (hereinafter called 'the Commission') as a mechanism for redress, and when such mediation fails, the victim should have access to the court. The court should also have the authority and discretion to refer matters for mediation in appropriate cases and the parties should have the right to opt for mediation. ADR should however not become substitutes for the courts, such that cases are to be diverted from the legal system for mediation.¹⁶⁶⁸ ADR should also not be made mandatory or as a condition for accessing the courts, because this will rob ADR of its voluntary nature of parties' submission to

¹⁶⁶² In France, the President of the Court of Appeal appoints 'conciliateurs'. See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 292.

¹⁶⁶³ See Simon Roberts, op. cit. p. 740.

¹⁶⁶⁴ See note 503.

¹⁶⁶⁵ See McEwen, Craig A.; Williams, Laura, op. cit. p. 870.

¹⁶⁶⁶ Others include human rights education, documentation and research, advising governments on human rights issues and setting human rights standards. See X, *National Human Rights Institutions: An overview of the Asia Pacific Region*, op. cit. pp. 209-10.

¹⁶⁶⁷ See Para. 36 of the World Conference on Human Rights. See X, *National Human Rights Institutions: An overview of the Asia Pacific Region*, op. cit. p. 213.

¹⁶⁶⁸ See Richard Ingleby, op. cit. p. 441.

it.¹⁶⁶⁹ Compulsory or mandated mediation also have the danger of increasing the cost and formality of dispute processing.¹⁶⁷⁰

The ADR mechanism being proposed should not be the traditional ADR through mediation, arbitration or conciliation, which are mostly used for business disputes as a result of its efficiency, which may not be accessible to the poor.¹⁶⁷¹ The point of attraction in ADR is in the informal procedure and the way issues are handled exclusively between the parties and their counsel if any, apart from the litigation procedure.¹⁶⁷² Complaints should, where possible, be lodged by victims of alleged violations and there can however be representative complaints on behalf of victims. A number of national institutions also have provisions for class actions.¹⁶⁷³

The reason for the above is because many national human rights institutions under conciliation for instance do bring parties together to ascertain the facts of the matter in order to find a mutually acceptable solution.¹⁶⁷⁴ Conciliation has been said to prove very useful in allegation of discrimination cases by removing the need for formal investigation into the case, since the procedure is less confrontational and thus allows room for attitudinal changes rather than punitive measures.¹⁶⁷⁵ In employing ADR for human rights enforcement, it has been advocated that if the defendant is being represented, then the aggrieved party must be represented by a lawyer and that the Commission shall be at liberty to invite any lawyer to assist in the matter.¹⁶⁷⁶ In the ADR system, lawyers can also be requested to submit *amicus curiae* briefs to assist the matter,¹⁶⁷⁷ but care must be taken not to turn the process into a rigid one.

Another important issue to be borne in mind in modelling the ADR mechanism is that lawyers and other stakeholders in the administration of justice should be effectively carried along for them to have input in the design and fine-tuning of modalities, so that they do not become obstructions to accessing justice through this medium. Carrying along stakeholders, especially lawyers, has been deemed highly important for the

¹⁶⁶⁹ Ibid at p. 443.

¹⁶⁷⁰ Ibid.

¹⁶⁷¹ For instance, the court-linked ADR Centre, Lagos Multi-Door Courthouse, in the Lagos Judiciary, is most suitable for business or other property disputes and not for redressing rights, because of the cost of accessing it. Individuals are expected to pay a non-refundable sum of N2,500 (approx. \$20) as administrative fees, and session fees payable vary depending on the type of human resources used. If an in-house neutral is used, an individual pays the sum of N5,000 (approx. \$40) per session but if the neutral is chosen from the government's joint partner of the ADR's panel of neutrals, the fees range from N10,000 (approx. \$80) to N50,000 (approx. \$ 406) per session. The fees are also to be paid at least 14 days before each session. See the Lagos Multi-Door Courthouse pamphlet, pp. 10-11.

¹⁶⁷² See X, *National Human Rights Institutions: An overview of the Asia Pacific Region*, op. cit. p. 213.

¹⁶⁷³ Ibid at p. 267.

¹⁶⁷⁴ Ibid.

¹⁶⁷⁵ Ibid, where the author was making reference to the UN Handbook on National Institutions, which according to him suggests that conciliation has been particularly successful in relation to allegations of discrimination. The author however concludes that since the cooperation of both parties is essential, success of conciliation ultimately depends on the existence of other recourse measures.

¹⁶⁷⁶ See McEwen, Craig A.; Williams, Laura, op. cit. p. 870.

¹⁶⁷⁷ See Wanemaker, Jaclyn S., *Public Interest Groups Litigation Alternatives*, 21 Buff. Pub. Int. L.J. 148 (2002 -2003) p. 148.

lawyers who may be apprehensive of losing clientele or ‘fears about loss of control over the matter of their clients’.¹⁶⁷⁸ Education may then be necessary for lawyers to prepare them for participation in ADR in order to develop their skills with respect to ‘counseling, interviewing, negotiation, mediation and non-curial advocacy’ (non-court advocacy).¹⁶⁷⁹

The Commission would be required to build capacity for its expected role in ADR and ensure that only qualified personnel handle ADR matters and that a minimum standard of guarantees of fairness among others are maintained in order not to make the ADR mechanism provide the poor with a second class justice.¹⁶⁸⁰ The Commission should also safeguard the interest of the poor and disadvantaged class by allowing them to freely make their decision and not to dominate them.¹⁶⁸¹ Victims should also be offered quality advice on redress of their rights at the time the complaint is lodged. Informality should not rob ADR of safeguards, in order to ensure that weak parties such as the poor are not coerced or manipulated by stronger parties.¹⁶⁸² Otherwise, outcomes of ADR may turn out to be ‘an imposed decision rather than a negotiated agreement.’¹⁶⁸³

4.3.2 Criticisms of ADR

ADR, in spite of its prospects has been subjected to a barrage of criticisms. It has been stated for instance that ‘Mediated negotiations may operate to the disadvantage of weaker parties where significant imbalances of power are present’,¹⁶⁸⁴ or subject to abuse by the stronger party.¹⁶⁸⁵ There are also arguments that negotiation and mediation often tend to favour the powerful,¹⁶⁸⁶ and that the problem remains whether bargaining can really be said to be equal or consent truly free.¹⁶⁸⁷ Critics have also argued that the alternatives provided by ADR were not likely to enhance both access to justice in practice and that the effect of the movement would be to discourage the disadvantaged from asserting their legal rights.¹⁶⁸⁸ Bentham has been shown for instance not to be in favour of ‘compromise’ on the ground that it is a denial of justice, and it was also

¹⁶⁷⁸ Ibid.

¹⁶⁷⁹ See William Twining, op. cit. p. 381.

¹⁶⁸⁰ See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 288.

¹⁶⁸¹ See Cyril Glasser and Simon Roberts, op. cit. p. 280.

¹⁶⁸² See Simon Roberts, op. cit. p. 462.

¹⁶⁸³ Ibid at p. 453.

¹⁶⁸⁴ Ibid.

¹⁶⁸⁵ Cappelletti stated for instance that where there is no equality of arms between the parties, ADR might be abused by the stronger party. He gave the example of the small claims courts which were said to have degenerated in some cases to debt collection agencies against the poor people, as studies on Europe, U.S. and Japan have revealed. See Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement*, op. cit. p. 290.

¹⁶⁸⁶ See William Twining, op. cit. p. 384.

¹⁶⁸⁷ Ibid at p. 385.

¹⁶⁸⁸ See William Twining, op. cit. p. 381.

argued that cases of ‘compromise, even in situations of equality of bargaining power when parties freely consent, involves the sacrifice of rights and hence a cost.’¹⁶⁸⁹

The involvement of States in ADR has been criticized on grounds of movement towards ‘informalism’ and it was further argued that the position of disadvantaged litigants (especially on representation and outcomes) hardly improves and that it even worsens where States substitute such alternative procedures for formal adjudication.¹⁶⁹⁰ This is more so, where the agencies for informal adjudication also become overwhelmed by workload.¹⁶⁹¹ Further concern on ‘informalism’ is that judicial integrity of adjudication could be damaged/compromised through judges’ involvement with ADR, and that the individual litigants or particular classes of litigant will suffer disadvantages if judicial authority is lent to informal processes.¹⁶⁹² Also settlement, has been argued may not always be desirable to legal remedies.¹⁶⁹³

The encouragement of settlement in preference to adjudication has further been criticized, in particular that ‘the negotiation process is a tendency to compromise key legal and political values’ on the ground that the role of judges in dispute resolution is secondary to that of re-stating important public values by means of judgment, such that alternatives undermine the creative role of the courts in developing public policy and inventing new solutions, with the result that opportunity to articulate central values is lost, and that as these values fall away from public attention the stability of the polity is threatened.¹⁶⁹⁴

In view of the genuine concerns raised by some of these criticisms, it has become important to devise means of neutralizing such possible harm that can result from ADR processes. However, court’s sponsorship of mediation has been interpreted as providing common interest for participants, and tended to be seen both as procedural innovations and as an instance of ‘alternative dispute resolution’.¹⁶⁹⁵ Judges have also been said to have shown readiness in becoming more involved in mediation rather than the strict roles they play in adjudication.¹⁶⁹⁶

4.3.3 Conclusion

Notwithstanding the concerns about ADR, the opportunity of accessing flexible, free and cheap legal means of access to justice makes it attractive, and will be vital to the poor as an alternative in confronting challenges of human rights abuses and lifting them out of poverty. The idea of ADR will no doubt help manage litigation and ensure that litigation is resorted to as the last option and in cases of serious rights violations.¹⁶⁹⁷

¹⁶⁸⁹ Ibid at p. 384.

¹⁶⁹⁰ See Cyril Glasser and Simon Roberts, op. cit. pp. 278 and 280; Simon Roberts, op. cit. p. 458.

¹⁶⁹¹ Ibid.

¹⁶⁹² See Simon Roberts, op. cit. p. 461.

¹⁶⁹³ See Richard Ingleby, op. cit. p. 442.

¹⁶⁹⁴ See Cyril Glasser and Simon Roberts, op. cit. p. 279; William Twining, op. cit. p. 381.

¹⁶⁹⁵ See Cyril Glasser and Simon Roberts, op. cit. p. 280.

¹⁶⁹⁶ Ibid at p. 278; Simon Roberts, op. cit. p. 461.

¹⁶⁹⁷ See Richardson, Ivor, op. cit. 170.

Necessary safeguards should however be put in place to ensure that the poor are not compromised of their rights, a stronger party does not hijack the process or influence the outcome, that the ADR is voluntary, it does not replace the courts and that the victim's decision to contest any outcome of mediation would not result in the imposition of a fine or be made to suffer other disadvantages.

4.4 HUMAN RIGHTS EDUCATION

An important component in broadening access to justice is the education of the people on their rights.¹⁶⁹⁸ In her second report, the Independent Expert on human rights and extreme poverty stressed the importance of information and education for the poorest people concerning their rights.¹⁶⁹⁹ Towards this end, the Expert recommended that specific human rights education techniques - simple messages by using national media, backing up messages by simple handbooks and cartoon strips providing information about available services - must be devised to reach persons in extreme poverty, who are often illiterates.¹⁷⁰⁰ This has become compelling in view of the level of poverty, illiteracy and ignorance in Nigeria as previously examined in this work.

Realizing the importance of human rights education to human rights awareness and enforcement, the General Assembly of the United Nations, building on the achievements of the United Nations Decade for Human Rights (1995-2004),¹⁷⁰¹ on 10 December 2004 proclaimed the World Programme for Human Rights Education (2005-ongoing) to advance the implementation of human rights education programmes in all sectors.

The World Programme seeks to promote a common understanding of the basic principles and methodologies of human rights education, provide a concrete framework for action and to strengthen partnerships and cooperation from the international level down to the grass roots. The objectives of the programme among others are basically to promote the development of a culture of human rights based on international instruments, basic principles and methodologies for human rights education, and to ensure a focus on human rights education at the national, regional and international levels.

By the same token, the Principles for human rights educational activities within the world programme entails the promotion of interdependence, indivisibility and

¹⁶⁹⁸ See Vinodh Jaichand, op. cit. p. 134.

¹⁶⁹⁹ See E/CN.4/2000/52, the second report of the Independent Expert on human rights and extreme poverty, para 104 p. 31.

¹⁷⁰⁰ Ibid.

¹⁷⁰¹ The World Conference on Human Rights in the Vienna Declaration and Programme of Action, in particular, para. 33 of Section I stated that human rights education, training and public information were essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace. See A/CONF.157/23 of 12 July 1993.

universality of human rights; fostering respect for appreciation of differences and promotion of non-discrimination; analysis of chronic and emerging human rights problems (including poverty, violent conflicts and discrimination), the solutions to which must be consistent with human rights standards. Human rights education should also focus on empowerment of communities and individuals to identify their human rights needs and to ensure that they are met, fostering knowledge of and skills to use local, national, regional and international human rights instruments and mechanisms for the protection of human rights, etc.¹⁷⁰²

The World Programme for Human Rights education is premised on the fact that by promoting respect for human dignity and equality and participation in democratic decision-making, human rights education contributes to the long-term prevention of abuses and violent conflicts.¹⁷⁰³ According to the Plan of Action, human rights education is to be by education, training and information aimed at building a universal culture of human rights. It is deemed that a comprehensive education in human rights not only provides knowledge about human rights and the mechanisms that protect them, but also imparts the skills needed to promote, defend and apply human rights in daily life.¹⁷⁰⁴

The first phase of the action¹⁷⁰⁵ which covered the period 2005-2007, focused on the primary and secondary school systems and proposes a concrete strategy and practical ideas for implementing human rights education nationally. The key components of the Plan of Action are that educational policies, including curricular, should promote a rights-based approach to education, and that adequate resources be allocated for the setting up of coordinating mechanisms, that will ensure coherence, monitoring and accountability.

A holistic approach is to be adopted in respect of teaching and learning that will reflect human rights values, starting as early as possible, such that human rights concepts and practices are integrated into all aspects of education. For example, curriculum content and objectives are to be rights-based, methodologies should be democratic, and all materials and textbooks should be consistent with human rights values.¹⁷⁰⁶ At the national level,¹⁷⁰⁷ ministries of education are to create or designate a unit within their

¹⁷⁰² See <<http://www.ohchr.org/english/issues/education/docs/A.59.525.Rev.1.pdf>> accessed 5 August, 2007.

¹⁷⁰³ See THE PLAN OF ACTION FOR 2005-2007 IN BRIEF, <http://www.ohchr.org/english/issues/education/training/docs/planaction-inbrief.pdf>> accessed 5 August, 2007.

¹⁷⁰⁴ Ibid.

¹⁷⁰⁵ Developed by a broad group of education and human rights practitioners from all continents.

¹⁷⁰⁶ Ibid.

¹⁷⁰⁷ The Plan of Action is to be coordinated from the national level to the international level. At the international level, the Plan of Action proposes the creation of a United Nations inter-agency coordinating committee, composed of the Office of the United Nations High Commissioner of Human Rights (OHCHR), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP) and other relevant international agencies. With the Office of the High Commissioner providing its secretariat, this committee will meet regularly to follow up on the implementation of the Plan of

structure responsible for coordinating the development and monitoring of the national implementation strategy for human rights education in the school system. This unit will also be responsible for liaising with the United Nations.¹⁷⁰⁸

The importance of building a culture of human rights awareness and commitment has led many countries of the world to incorporate human rights education within the school system. Inculcating human rights education in schoolchildren will go a long way in raising a new generation of people who are human rights conscious, which can be used to protect and enforce their rights and thus escape poverty which violations of rights engenders. In Cambodia for instance, 25,000 teachers have been trained in human rights and they have already taught more than 3 million children. Also in Ecuador, a week of television programmes was devoted to explaining the rights of the child and then made it possible for children to use the electoral machinery to vote on which rights they thought most important for themselves.¹⁷⁰⁹

Apart from the pockets of human rights education that the National Human Rights Commission have conducted in Nigeria, the country is yet to put in place a national plan for human rights education as contained in the World Programme for Human Rights Education. In the third volume of the *Voices of the Poor*, "From Many Lands", testimony of poor people being oblivious of their rights and their eagerness to know attests to the importance of human rights education. One Fernando from Brazil, for instance was quoted to have said:¹⁷¹⁰

"In favela people have no idea of their rights. We have police discrimination; the politicians abuse us, and others use their knowledge to take advantage of us. So I want to know all about rights and obligations."

Action, mobilize resources and support actions at country level, as well as ensure United Nations system-wide support to the national implementation strategy. See THE PLAN OF ACTION FOR 2005-2007 IN BRIEF, <<http://www.ohchr.org/english/issues/education/training/docs/planaction-inbrief.pdf>> accessed 5 August, 2007.

¹⁷⁰⁸ Ibid At the conclusion of the first phase (2005-2007) of the World Programme, each country will evaluate its actions and report to the United Nations inter-agency coordinating committee. On the basis of these reports, the committee will prepare a final report for the General Assembly in 2008. See THE PLAN OF ACTION FOR 2005-2007 IN BRIEF,

<<http://www.ohchr.org/english/issues/education/training/docs/planaction-inbrief.pdf>> accessed 5 August, 2007.; see also the Revised draft plan of action for the first phase (2005-2007) of the World Programme for Human Rights Education, annexed to document General Assembly A/59/525/Rev. 1.

<<http://www.ohchr.org/english/issues/education/docs/A.59.525.Rev.1.pdf>> accessed 5 August, 2007.

¹⁷⁰⁹ See UNDP, Human Development Report 2000, op. cit. p. 11.

¹⁷¹⁰ See Bridging the gap between human rights and development: from normative principles to operational relevance, lecture by the United Nations High Commissioner for Human Rights - Mary Robinson at the World Bank, 3 December 2001, where she made reference to the testimony from Brazil at the launch of the third volume of the *Voices of the Poor*, *From Many Lands*. See Narayan, Deepa and Patti Petesch (2002), *Voices of the Poor: From Many Lands*, op. cit. <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/2DA59CD3FFC033DCC1256B1A0033F7C3?opendocument>> accessed 7 September 2007.

The situation in favelas¹⁷¹¹ in most cases represents the position among the poor in Nigeria. There is thus an urgent need for the government to put in place a national plan of action in accordance with the World Programme for Human Rights for aggressive rights education and campaign, to sensitize the people about their rights. People can hardly be expected to enforce the rights they don't know and use the same to lift themselves out of poverty, by demanding accountability in any form. Rights education will greatly enhance the poor and disadvantaged members of society to become increasingly aware of their rights and it will empower them to enforce rights, redress violations and in turn reduce poverty.

It is beyond doubt that the incidence of high levels of poverty and illiteracy in Nigeria isolate the people and handicap them from the mainstream of the law, because people whose rights have been violated are either unaware of their rights and how they can access professional advice and services, which is further made difficult by financial and/or geographical reasons.¹⁷¹² High levels of poverty and illiteracy have also been attributed to the inability of many people being unable to place their problems effectively before the courts.¹⁷¹³

Integrated human rights education and services, targeted at every segment of society, especially the poor and vulnerable groups, including inculcation of human rights education in schoolchildren, will go a long way to empower the people. Translating the two international human rights covenants into local languages of the people, starting with the languages of the three major tribes, Ibo, Hausa and Yoruba, with a progression into other local languages, will be very helpful in human rights education. Basic human rights principles should also be summarized in the local languages to make them reader friendly, as advocacy and human rights education can be used to empower even poor communities to demand their rights.¹⁷¹⁴ The UDHR for instance has been translated into the said three main local languages in Nigeria, to commemorate the 50th anniversary of the declaration.

Another crucial issue is access to the relevant laws. The availability of the laws in the local language summarized in non-legal language so that an average person can understand them¹⁷¹⁵ is equally important. The Nigerian Constitution and other laws that impact on the daily lives of the people should be translated into local languages.

During the fieldwork, this work gathered that not many people are aware of their human rights. The fieldwork also revealed that people are generally oblivious of their rights, including the junior ranks among the police. Some of the people interviewed simply stated that there is nothing like rights in Nigeria, considering the injustice in society that occurs daily without an effective system of redress for victims and accountability that

¹⁷¹¹ Favelas refer to the shanty towns or slums of Rio de Janeiro, Brazil. See X, Inside Rio's violent favelas, BBC News, <<http://news.bbc.co.uk/2/hi/americas/6266770.stm>> accessed 10 April 2008.

¹⁷¹² See Budlender, Geoff, op. cit. p. 341.

¹⁷¹³ See Vinodh Jaichand, op. cit. p. 128.

¹⁷¹⁴ See UNDP, Human Development Report 2000, op. cit. p. 100.

¹⁷¹⁵ Ibid at p. 103.

brings violators to account. Some of the people also stated that it would be nice to have such rights in place, while they were in turn informed that some of these rights are already provided in the Constitution. The people, especially at the local level need a clear understanding of what particular rights mean in concrete entitlements in order to be able to claim them.¹⁷¹⁶

The Federal Government should design a national plan for human rights education in conjunction with the National Human Rights Commission and civil society, and the national human rights institution should be a vehicle for rigorous and sustained human rights education in Nigeria. Enlightenment programmes, through the mass media, pamphlets, cartoons, drama series, etc., aimed at educating the populace on their rights and how to protect them, where they can get professional advice and access other necessary services should be urgently embarked upon. The grass roots people should be effectively carried along on rights education, enlisting the support of community leaders and various interest groups. Effective human rights education has the potential 'to influence the process of development and to be a force of democratic empowerment'.¹⁷¹⁷

In accordance with the World Programme, educational curricula of schools from primary to tertiary levels should incorporate human rights as a compulsory subject/course, especially in the Law Faculties; while 'an interdisciplinary minor' course should be developed for students of other faculties at the tertiary level.¹⁷¹⁸ A human rights course should equally be developed for adult education in the community.¹⁷¹⁹ This will make human rights knowledge pivotal in education and in a lifelong educational process towards impacting human rights consciousness nationally and from the early stages. This is more so, as 'a human rights "culture" cannot be legislated' and gaining understanding for genuine respect for human rights has to be through education.¹⁷²⁰ Also, 'legislation alone is not sufficient to ensure the realisation of human rights'.¹⁷²¹

Importance of human education also stems from the fact that although redress for human rights violations has a deterrent effect, the fact that it is usually employed after abuses have been committed 'do not effectively promote the conditions for rights to flourish'.¹⁷²² Thus human rights education has the potential to be protective of rights, thereby preventing abuses rather than being reactive or remedial. The UN Commission on Human Rights has thus stressed that human rights education should be given priority in education policies, both in its theoretical and practical application.¹⁷²³

¹⁷¹⁶ See the UK's Department for International Development, *Realising human rights for the poor people: Strategies for achieving the international development targets*, October 2000, p. 8.

¹⁷¹⁷ See Vincent Iacopino, *Book review*, 20 Hum. Rts. Q. 731 (1998) p. 732.

¹⁷¹⁸ Ibid.

¹⁷¹⁹ Ibid.

¹⁷²⁰ Ibid at p. 731.

¹⁷²¹ See the UK's Department for International Development (DFID), op. cit. p. 14.

¹⁷²² Ibid at p. 731.

¹⁷²³ See Preamble to Resolution 2000/17 of 26 April 2000, Commission on Human Rights on the United Nations Decade for Human Rights Education.

In order to garner the necessary funds for human rights education and coordination of mechanisms, it has been suggested that fundraising can be organized for this purpose.¹⁷²⁴ This will augment whatever funding the government might provide for this purpose.

4.5 The need for judicial reforms

Litigation in Nigeria is associated with inordinate delays as examined above¹⁷²⁵ and this exhausts money, time, patience and breeds frustrations, thus discouraging enforcement of rights and it also affects the remedies that one can get from the courts. This is further compounded by having to traverse the long judicial hierarchy from the High Court to the Court of Appeal and then to the Supreme Court and the means to exhaust them. The current chain or hierarchy of courts in Nigeria may unduly prolong both litigation and prosecution in criminal trials, especially in view of the slow pace of the administration of the justice system.

Justice is very crucial in society and ‘any society which cannot ensure equal justice for its citizens – and even non-citizens –within its borders cannot be said to be healthy.’¹⁷²⁶ In order to ensure quick dispensation of justice, this work advocates justice sector reforms especially in the area of shortening the length of judicial ladders to be traversed in order to exhaust judicial remedies. This may involve the consideration of having a reform with the following possibilities, among others:

1. The Court of Appeal, which is the middle court between the High Court and the Supreme Court, is eliminated from the current judicial hierarchy in Nigeria, with the High Court and Supreme Court remaining as the only superior courts of record. Therefore appeals will now lie directly from the High Court, which is the court of first instance in human rights cases to the Supreme Court, which is the final court. This is the position in some jurisdictions.¹⁷²⁷ This will shorten the distance which a prospective litigant has to traverse in enforcing fundamental rights. Currently, appeal lies from the High Court to the Court of Appeal and finally to the Supreme Court.

or

¹⁷²⁴ See Vincent Iacopino, *op. cit.* p. 733.

¹⁷²⁵ See *vide infra* sections 2.6.2 the right to a fair hearing, 2.6.18 on the right to an effective remedy, 3.2.7 on inefficient administration of justice in this work.

¹⁷²⁶ See Hon. Dr. T. Akinola Aguda (1987), *op. cit.* p. 1.

¹⁷²⁷ In South Africa, there is no Court of Appeal. The hierarchies of courts are: the Constitutional Court, which is the highest court in constitutional matters, the Supreme Court of Appeal, which is the final court handling all other appeals apart from constitutional matters, the High Courts, then Magistrate and other courts. See Articles 166, 167 and 168 of the Constitution of the Republic of South Africa 1996. Also in India, there is no Court of Appeal between the High Court and the Supreme Court, and appeals in all matters, civil, criminal and other proceedings lie from the High Court to the Supreme Court (see Articles 132, 133 and 134 of the Indian Constitution 1950). In fact, both the High Court and the Supreme Court of India have jurisdiction in respect of fundamental rights. See Articles 32(1) of the Indian Constitution 1950 for moving the Supreme Court and 226 for the High Court.

2. Appeals on constitutional and human rights cases will lie from the High Courts directly to the Supreme Court as enjoying special status, and the Court of Appeal is therefore by-passed.

The possibilities of having the position in either (1) or (2) above will enhance building jurisprudence on human rights matters, with the Supreme Court setting the precedents. The Supreme Court will however require to be reorganized and strengthened in order not to become overburdened by workload.

or

3. A Constitutional Court is established to take constitutional and human rights matters. The existence of a constitutional court may go a long way to relieve the Supreme Court of Nigeria from the burden of workload which results from its serving as the final appellate court on all legal and constitutional matters. This work is more disposed to this position, not only for the possibility of ensuring efficiency, but on the grounds that a constitutional court is likely to pay special attention to human rights matters and be less legalistic in construing them.

Proposed judicial reforms will require to painstakingly look into the current judicial hierarchy in Nigeria in order to determine where inordinate delays usually occur within the hierarchy of courts. This will be necessary because carrying a fundamental justice sector reform will require constitutional amendment.

Justice sector and legal system have become associated with development and poverty reduction as an efficient legal system promotes economic growth.¹⁷²⁸ This has been responsible for the move towards strengthening the capacity of justice institutions and improving them, so that the poor will be able to use them to enforce their rights and demand accountability, not only of public institutions and government actions that affect them but also to bring violators to account.¹⁷²⁹ This move is associated with problems and failures of the justice sector, as the legal system has been regarded as an important vehicle in implementing a rights-based approach to poverty reduction.¹⁷³⁰

The administration of justice system should therefore be completely overhauled to address inefficiency and the ills in the sector in order to ensure fast-track justice delivery; the rules of procedure should be reviewed to remove technicalities which breed delay. It has been argued that ‘if courts are going to be taken seriously as deliberate fora, then accessibility and equality within the courtroom must be a priority,’

¹⁷²⁸ See Bård A. Andreassen, “Poverty, Human Rights and Justice Sector Reform in Kenya and Uganda”, in Margot E. Salomon, Arne Tostensen and Wouter Vanderhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, (due for publication 2007) (manuscript at p. 3, on file with researcher).

¹⁷²⁹ Ibid at p. 2.

¹⁷³⁰ Ibid at pp. 3 and 7.

in addition to using demystifying language, and the adoption of a simpler and more accessible procedure.¹⁷³¹

As a result of the problems of access to justice and judicial services for the poor and marginalized groups, this has made international institutions such as the World Bank and development agencies fund legal and judicial reforms especially in developing countries.¹⁷³² Government's capacity to provide accessible justice and legal redress based on respect for human rights is central to the realization of human rights for the poor.¹⁷³³ It is equally necessary for the rule of law¹⁷³⁴ to reign in order for reforms to have desired effects.¹⁷³⁵

4.6 Summary

Public interest has been described as a demonstrated attempt at rights empowerment, giving tangible meaning and contents to human rights.¹⁷³⁶ This clearly attests to the potential of a combination of some of these mechanisms both as a catalyst to accessing justice for the poor and poverty reduction. A combination of alternative ADR, PIL and human rights education promises to provide choice and enhance access to justice for the poor in Nigeria and also greatly empower them to escape the pangs of poverty.

It has been stated that no system is perfect and that no matter how good the system, there are always exceptions.¹⁷³⁷ On account of this, this work takes cognizance of the fact that the entire problems of accessing justice for the poor may not be totally solved by the proposals made in this work, because not all problems social or legal may be totally solved, as part of the solutions to the problems may turn out to become problems in themselves, requiring solutions. It is however the belief of this work that the proposals made herein will by and large provide enhanced and equal access to justice for the poor for the ultimate realization of their human rights, which will empower them to escape poverty.

Embarking on judicial reforms that will not only encompass the adoption of PIL as proposed in this work but also involve a reform of the judicial institutions in terms of

¹⁷³¹ See Sandra Fredman, op. cit. p. 107.

¹⁷³² See The World Bank, Legal and Judicial Reform: Strategic Directions, January 2003 p. 42 and 44.

¹⁷³³ See UK's Department for International Development (DFID), op. cit. p. 14.

¹⁷³⁴ The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. See The Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone, Volume II, op. cit. p. 3.

¹⁷³⁵ See Bård A. Andreassen, "Poverty, Human Rights and Justice Sector Reform in Kenya and Uganda", in Margot E. Salomon, Arne Tostensen and Wouter Vanderhole (eds.), op. cit. p. 3.

¹⁷³⁶ See Vinodh Jaichand, op. cit. p. 128.

¹⁷³⁷ See X, *Equal Access to Free and Independent Courts*, op. cit. p. 681.

structure of the courts, strengthening capacity and improving on the services are necessary in order for the pro-poor mechanism of access to justice to have the desired effects.

One issue that is worth mentioning is the incorporation of international human rights covenants to which Nigeria is a party, into the national laws in compliance with her treaty obligations. This will ensure imperativeness, expansion and enforcement of the range of human rights in Nigeria, for effective realization of those rights for the poor, as a strategy for poverty reduction. Unless some of the rights are recognized under domestic laws, they cannot form an integral part of the justice and legal administration system.¹⁷³⁸ The Copenhagen Declaration of 1995, which resulted from the World Summit for Social Development, contributed to the elucidation of the legal standing of ESC rights. Specifically, the Declaration proposes the enhancement of human dignity by reliance on all human rights, including ESC rights, and on the ratification and implementation of the CESC.¹⁷³⁹ These issues will be discussed more in the subsequent chapter.

¹⁷³⁸ See UNDP Report 2000 pp. 7 and 74; see Office of the United Nations High Commissioner for Human Rights, Handbook on National Human Rights Plans of Action, UN New York and Geneva, 29 August 2002 p. 2.

¹⁷³⁹ See Paras. 5, 9, 10, 28a, 26 and 26(f) of the Declaration; see also Lucie Lamarche, *op. cit.* pp. 26-27 for a discussion of this issue.

CHAPTER 5

JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

5.1 Indivisibility of human rights

In spite of the fact that this work did not consider civil and political rights in isolation, it is deemed essential to consider this part because of the way the 1999 Constitution, like its predecessor,¹⁷⁴⁰ discriminates between civil and political rights and ESC rights, by making the former justiciable, while the latter is not. This inferior status of ESC rights under the Constitution has put a hole in their enforceability fifteen years after Nigeria's accession to the ICESCR,¹⁷⁴¹ and owing to the principle of interrelatedness and indivisibility of human rights, this work explores their justiciability in order for the poor to be able to activate their access to justice conceptualized in this work to enforce all human rights without exception.

The UDHR which is the background instrument on human rights did not discriminate between civil and political rights and ESC rights.¹⁷⁴² Unfortunately, the UDHR is not legally binding. The international covenants on human rights,¹⁷⁴³ in their preambles clearly indicate that the two covenants are interrelated and interdependent.¹⁷⁴⁴ The principles of indivisibility and interdependence of human rights have been recognized the UN World Conferences, General Assembly's resolutions and in major international documents on human rights.¹⁷⁴⁵ They underpin the fact that the full realization of civil

¹⁷⁴⁰ The Constitution of Federal Republic of Nigeria, 1979.

¹⁷⁴¹ The International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200 A (XXI) of 16 December 1966, and entered into force on 3 January 1976. Nigeria acceded to the ICESCR on 29 July 1993.

¹⁷⁴² See UDHR Articles 3 – the right to life, liberty and security of human person; 22 – the right to social security; 23 – the right to work; 25(1) – the right of everyone to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control; 26 – the right to education.

¹⁷⁴³ That is the ICESCR and the ICCPR, which fleshed up the rights in UDHR and gave legal force to them. In A/RES/60/149 of 16 December 2005 – on International Covenants on Human Rights - the UN General Assembly reiterates the fact that the International Covenants on Human Rights constitute the first all-embracing and legally binding international treaties in the field of human rights and, together with the Universal Declaration of Human Rights, form the core of the International Bill of Human Rights.

¹⁷⁴⁴ See the preamble to the ICESCR and ICCPR which contains the words: "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."

¹⁷⁴⁵ See for example the Proclamation of Teheran of 1968 para 13 which states that: 'Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible...' The Vienna Declaration and Programme of Action, para 5 which states in part that: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair

and political rights without the enjoyment of ESC rights is impossible and *vice versa*.¹⁷⁴⁶ This indicates the interlocking nature of human rights, the guarantee of one is a precondition for the other, and *vice versa*, such that the non-guarantee of one results in the violation of the one guaranteed and *vice versa*.¹⁷⁴⁷

ESC rights have been recognized in major international instruments on human rights on the protection of vulnerable groups.¹⁷⁴⁸ The African Charter also treats civil and political rights equally; the two families of rights are contained in the same section and are both justiciable.¹⁷⁴⁹ The 1999 Constitution in Chapter IV provides for civil and political rights, as fundamental rights. The Constitution did not specifically provide for ESC rights, but the provisions relating to these rights are contained in Chapter II of the Constitution in sections 13-21¹⁷⁵⁰ and are tagged, ‘fundamental objectives and directive

and equal manner, on the same footing, and with the same emphasis...”; the UN General Assembly A/RES/32/130 of 16 December 1977 on alternative approaches, ways and means of improving the effective enjoyment of human rights and fundamental freedoms states that “All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.”; Declaration on the Right to Development adopted by UN General Assembly Resolution 41/128 of 4 December 1986, Article 6(2) ‘All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.’; Mr. Danilo Türk’s study on the realization of economic, social and cultural rights E/CN.4/Sub.2/1992/16 (final report of the study) represents enormous progress in clarifying the relationship between the latter rights and civil and political rights, demonstrating the indivisible and interdependent nature of human rights. E/CN.4/Sub.2/1992/16 Copenhagen Declaration on Social Development principle of 1995, para 5; The Bangalore Declaration and Plan of Action adopted at Bangalore, India 1995 (E/CN.4/1996/NGO/15) para 3; the Rome Declaration of World Food Security of 1996 para 14 objective 1.1; The Limburg Principles on the Implementation of the International Covenant on Economic, Social & Cultural Rights Maastricht, The Netherlands, 2-6 June 1986 para 3; The Maastricht Guidelines on violations of Economic, Social and Cultural Rights of 1997 para 4.; the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban, 31 August - 8 September 2001, which affirms the commitments of all states to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political. see the Report of the World Conference especially paras 11, 19 and 78; A/RES60/152 of 16 December 2005, which reiterates the Vienna Declaration.

¹⁷⁴⁶ See the Proclamation of Teheran of 1968 para 13; A/RES/32/130 of 16 December 1977 para 1 (b).

¹⁷⁴⁷ See Flavia Piovesan, *Social, Economic and Cultural Rights and Civil and Political Rights*, *Sur International Journal of Human Rights*, No. 1 1st September 2004 p. 22.

¹⁷⁴⁸ For instance, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child consider not only civil and political rights, but also social, economic and cultural rights, endorsing the indivisibility of human rights. See Flavia Piovesan, op. cit. note 5 p. 39.

¹⁷⁴⁹ See Articles 13 and 14 – the right to participate in the government of one’s own country, right of access to the public services of one’s own country and right to property. There are also rights to work (Article 15), right to health (Article 16), right to education and to take part in cultural life of his or her community (Article 17). See Pierre De Vos, *A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples’ Rights*, Law, Democracy and Development, vol. 8 2004 (1), p. 8.

¹⁷⁵⁰ The chapter contains among others, provisions of suitable and adequate shelter, suitable food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of disabled, adequate medical and health facilities for all persons, free education, etc. In the African Charter these are contained in Articles 15-18.

principles of State policy'. The Constitution provides in section 13 that it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of the Constitution. The Constitution however declared in section 6(6)(c) that the provisions shall not be legally enforceable, which has been judicially upheld.¹⁷⁵¹

The position of the Nigerian Constitution is to segregate rights and therefore violates the principles of indivisibility and interrelatedness of human rights and should be remedied.

5.2 Status of ECR rights in Nigeria's legal order

The non-recognition and implementation of ESC rights, raises the question of the status of ESC rights under the Nigerian Constitution and the country's obligations as a State Party to the ICESCR. Nigeria's approach to the relationship between international and municipal law is based on the dualist system,¹⁷⁵² based on section 12 of 1999 Constitution¹⁷⁵³ which regards international and municipal laws as separate legal orders, with neither having the power to alter the rules of the other. In case of conflict, municipal law is applied and it prevails.¹⁷⁵⁴ It follows that the ICESCR has to be domesticated before its provisions can be enforced. The dualist position is prevalent in most common law countries.¹⁷⁵⁵

However, it may be argued at this juncture, that the solution to the enforcement of the ICESCR seems not to lie in its domestication; this is because despite the fact that provisions relating to ESC rights are contained in the African Charter which has been domesticated and is now part of Nigerian laws, yet they cannot be enforced.¹⁷⁵⁶ Attempts to enforce these rights have met with judicial block walls, based on the

¹⁷⁵¹ See *Archbishop Olubunmi Okogie (Trustee of Roman Catholic School) & others v. Attorney-General of Lagos State* [1981] I N.C.L.R. 218, where it was held that the Directive Principles of State Policy in Chapter II of the Constitution have to conform to and run subsidiary to the fundamental rights and that Chapter II is subject to legislative powers conferred on the State. The Nigerian Supreme Court has however assented to the Federal Government's use of the provision of Chapter II section 15(5), which stipulates that 'the State shall abolish all corrupt practices and abuse of power', as a platform to legislate on corruption in Nigeria. See *Attorney-Gen., Ondo State v. Attorney-General., Federation* [2002] F.W.L.R. (Pt.111) 1972.

¹⁷⁵² See Edwin Egede, op. cit. p. 250.

¹⁷⁵³ Section 12(1) provides: 'No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.'

¹⁷⁵⁴ See Timothy Hillier (1998), *Sourcebook on International Public Law*, Cavendish Publishing Limited, London/Sydney, p. 35.

¹⁷⁵⁵ See John Dugard, "The Role of Human Rights Treaty Standards in Domestic Law: The South African Experience", in Michael Anderson and Matthew Happold (eds.) (2003), *Constitutional Human Rights in the Commonwealth*, The British Institute on International and Comparative Law, p. 2; Rosalyn Higgins, "The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom", in Benedetto Conforti and Francesco Francioni (eds.) (1997), *Enforcing International Human Rights in Domestic Courts*, Kluwer Law International, p. 38.

¹⁷⁵⁶ See African Charter on Human and Peoples' Rights (Ratification Enforcement) Act, cap 10 Laws of the Federation of Nigeria 1990 (as amended in 2004).

decision of the Supreme Court of Nigeria in *Abacha v. Fawehinmi*,¹⁷⁵⁷ to the effect that the African Charter cannot be superior to the Constitution and as such, anything not permitted under the Constitution cannot be enforced through the African Charter. This is premised on section 6(6)(c) of the Constitution which has declared ESC rights not justiciable and that one cannot use the provisions of the African Charter as a launch pad for the enforcement of such rights.¹⁷⁵⁸

The above decision of the Supreme Court was anchored on section 1(1) of the 1999 Constitution, which proclaims its supremacy¹⁷⁵⁹ and as such, its provisions overrides that of any other law.¹⁷⁶⁰ The possible interim measures and lasting solutions to this problem will be examined later in this work.

The above thus raises some primary concerns, such as, if provisions of the ICESCR voluntarily consented to by Nigeria without any reservation being lodged in respect thereof, are rendered ineffective by local legislation, what then is the use of such consent? What then are Nigeria's obligations in respect of this? According to the Committee on Economic, Social and Cultural Rights (CESCR),¹⁷⁶¹ part of the obligations of State Parties is that the ICESCR norms must be recognized within the domestic legal order and appropriate means of redress or remedies must be made available for breach of those rights and appropriate ways of ensuring governmental accountability must also be put in place.¹⁷⁶² This is because it is the primary duty of the government to guarantee the implementation and enforcement of rights within its borders.¹⁷⁶³

Also under Article 27 of the Vienna Convention on the Law of Treaties,¹⁷⁶⁴ a party cannot invoke provisions of its internal law as justification for its failure to perform a treaty. This clearly means that State Parties such as Nigeria should modify their

¹⁷⁵⁷ Supra.

¹⁷⁵⁸ This is however contradictory to the decision of the same Supreme Court earlier in *Ogugu v. The State*, [1994] 9 N.W.L.R. (Pt.366) 1, to the effect that the provisions of the African Charter are enforceable in the same manner as those of Chapter IV of the 1979 Constitution.

¹⁷⁵⁹ See Section 1(1) which provides that "This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria."

¹⁷⁶⁰ In fact, section 1(3) provides that "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."

¹⁷⁶¹ The Committee is a body of independent experts, established in 1985 by the Economic and Social Council (ECOSOC) by Resolution 1985/17 of May 1985 for the purpose of carrying out monitoring functions assigned by the ECOSOC under Part IV of the ICESCR on the implementation of the ICESCR by State Parties. State Parties to the treaty are required under Articles 16 and 17 of the ICESCR to submit reports to the Committee, on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations" in General Comment 9 (see E/C.12/1998/24, CESCR General comment 9 on the domestic application of the Covenant: . 03/12/98.)

¹⁷⁶² Ibid see para 2.

¹⁷⁶³ See Jean-Bernard Marie, "National Systems for the Protection of Human Rights", in Janusz Symonides (ed) (2003), op. cit. p. 257.

¹⁷⁶⁴ See United Nations, Treaty Series, vol. 1155, p. 331.

domestic legal order in order to give effect to their treaty obligations.¹⁷⁶⁵ According to various international documents and texts of international conferences, some of which are referred to above,¹⁷⁶⁶ ESC rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the ICESCR.

The Committee on Economic, Social and Cultural Rights, in its General Comment 9 contended that since Article 8 of the UDHR provides for the right of everyone to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law, and as such, State Parties are obliged to provide judicial remedies for acts violating ICESCR provisions.¹⁷⁶⁷ It maintained that a State Party seeking to justify its failure to provide any domestic legal remedies for violations of the ICESCR 'would need to show either that such remedies are not "appropriate means" within the terms of Article 2, paragraph 1, of the ICESCR or that, in view of the other means used, they are unnecessary.'¹⁷⁶⁸ This, the Committee however said the latter would be difficult to show since other means which are not insulated by judicial remedies could hardly be said to be appropriate.¹⁷⁶⁹

Although under the ICESCR it is not mandatory that its provisions be domesticated locally in a comprehensive manner as contained in that instrument itself, such that those provisions may be contained in pieces of legislation save that such means will only be deemed appropriate if they produce results which are consistent with State Parties' obligations.¹⁷⁷⁰ However, Nigeria may be said to have failed to comply with her treaty obligations under the ICESCR by not taking any step to implement its provisions domestically and making ESC rights justiciable. This is because, if justiciability is not assured, ICESCR treaty obligations cannot be said to have been given effect to in the domestic legal order of Nigeria.¹⁷⁷¹

This is based on the provision of Article 2(1) of the ICESCR which mandates State Parties to take all appropriate means towards the progressive full realization of ESC

¹⁷⁶⁵ See E/C.12/1998/24 of 3 December 1998. The domestic application of the Covenant, CESCR. General Comment 9.

¹⁷⁶⁶ See Note 1548 above.

¹⁷⁶⁷ Although, the Committee on Economic, Social and Cultural Rights also stated that right to an effective remedy may not necessarily mean a judicial remedy and that administrative remedies may suffice; provided that the provisions of the ICESCR are taken into consideration by such bodies, and they are accessible, timely, affordable and effective. Also, there must be a right of judicial appeal from such administrative bodies. The Committee however reiterates the fact that in some situations, judicial remedy would seem to be appropriate and indispensable, in order to fulfil the requirement of the ICESCR, such as obligations concerning non-discrimination. And ESC rights cannot be made fully effective without some role for the judiciary, such that judicial remedies are necessary. See General Comment 9 (domestic application of the Covenant) para 9. There is no reason that while civil and political rights should be accorded judicial remedies and ESC rights are not, based on the indivisibility of rights.

¹⁷⁶⁸ Ibid See General Comment 9 (domestic application of the Covenant) para 3.

¹⁷⁶⁹ Ibid.

¹⁷⁷⁰ Ibid para 5.

¹⁷⁷¹ See para 7.

rights. The said article stressed the words ‘including particularly, the adoption of legislative measures’, to indicate the importance of justiciability of ESC rights in the domestic legal order.¹⁷⁷² It is in these respects that direct incorporation/application of the ICESCR at the domestic level is mandatory, as this will enhance the scope and effectiveness of remedial measures.¹⁷⁷³

If legislative measures are not taken and judicial remedies made available domestically, it will be difficult to enforce provisions of the ICESCR. By virtue of Nigeria’s accession to the treaty, it accepts the obligations to be legally bound by its provisions.¹⁷⁷⁴ Thus it has a duty to make her domestic laws to be in harmony with her treaty obligations, and under which it is also responsible to her citizens and those within her jurisdiction for the duty to respect, protect, promote and fulfil that flows from those rights.¹⁷⁷⁵ Indeed, if Nigeria and other State Parties are allowed to ratify an international treaty and then use their domestic laws to render it ineffective, they will be approbating and reprobating - a situation which has made international human rights laws observed to have been more in breach than in compliance. Interpretation of domestic laws must equally be interpreted in a manner that will be consistent and give effect to the intent and purposes of the treaty obligations.¹⁷⁷⁶

Under international law, courts are to avoid decisions that will put their State Parties in breach of their treaty obligations,¹⁷⁷⁷ such that the Supreme Court of Nigeria in *Abacha v. Fawehinmi* (supra), should have decided the matter in a manner to make Nigeria comply with her treaty obligations.¹⁷⁷⁸ This is more so, because as a common law country, judge-made law can sometimes be of more importance than legislation, as a result of the exalted rule of judicial precedents.¹⁷⁷⁹ The Indian example is illustrative of this. It thus follows that since domestic law(s) prevents the implementation of the ICESCR in Nigeria as noted above, this impedes the country’s obligations under that

¹⁷⁷² See General Comment 3 – (the nature of State Parties obligations) Article 2, par.1)) para 3.

¹⁷⁷³ See General Comment 9 (domestic application of the Covenant) para 11.

¹⁷⁷⁴ The global legitimacy of international human rights norms was reaffirmed by the Vienna Declaration and Programme of Action adopted unanimously by representatives of all 171 states attending the World Conference on Human Rights (14-25 June 1993). See Office of the High Commissioner for Human Rights, Human Rights and Poverty Reduction - A Conceptual Framework, United Nations New York and Geneva 2004 p. 1.

¹⁷⁷⁵ See General Comment 12 (right to adequate food) paras 5 and 15; General Comment 9 (the domestic application of the covenant) para 11.

¹⁷⁷⁶ See Fact Sheet No. 16 (Rev. 1), the Committee on Economic, Social and Cultural Rights.

¹⁷⁷⁷ See P. Alston and G. Quinn, *The nature and scope of States parties' obligations under the International Covenant on Economic, Social and Cultural Rights*, Human Rights Quarterly, vol. 9, No. 2 (May 1987), p. 171, cited in Fact Sheet No. 16 (Rev. 1), The Committee on Economic, Social and Cultural Rights.

¹⁷⁷⁸ See O.V.C. Okene and G.A. Okpara, op. cit. pp 192-123.

¹⁷⁷⁹ See Fons Coomans, “Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context”, in Fons Coomans (ed.) (2006), op. cit. p. 8.

treaty as imposed by Article 2(1), such that the country's obligations in the circumstances will include the taking of legislative action to remedy the situation.¹⁷⁸⁰

5.3 Necessity for judicial review of ESC rights

Before examining the issue of justiciability of ESC rights, it is important to state that this work does not intend to dwell extensively on the nature of obligations imposed by Article 2(1) of the ICESCR,¹⁷⁸¹ which requires each State Party 'to take steps'... 'to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant...', because these have been covered well.¹⁷⁸² Furthermore, the Committee in General Comment 3,¹⁷⁸³ has stated, that it is essential that State Parties should state in their periodic reports, specific measures that have been taken to give effect to the provisions of the ICESCR in order for the Committee to determine whether they are appropriate or not, and not for States to simply give a blanket statement that 'measures have been taken.'¹⁷⁸⁴

The reason for this requirement is that, some State Parties, including those afflicted by severe poverty, such as Nigeria, hardly implement the provisions of the ICESCR.¹⁷⁸⁵ Despite the desirability of requiring States to indicate in their periodic reports, specific measures they have adopted, which is necessary for monitoring compliance, this work posits that a judicial review will better serve the purpose of accountability at national level. It can be determined for instance, whether the measures claimed to have been adopted by the government can be said to meet with the minimum requirements of ESC rights. For example, requiring executive bodies to render account of their fulfilling 'a

¹⁷⁸⁰ See Bangalore Declaration and Plan of Action, para 18.3.2.; The Vienna Declaration and Programme of Action in Part II para 98 in part states that there must be a concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels.

¹⁷⁸¹ Article 2(1) of the ICESCR provides that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

¹⁷⁸² These have been covered well by General Comment 3 (nature of State Parties' obligations, Article 2(1)); General Comment 9 (domestic application of the Covenant) and other authors have equally examined these in details, see Sandra Fredman, op. cit.; David Bilchitz, op. cit.; Audrey Chapman and Sage Russell (eds.) (2002), *Core Obligations: Building A framework for Economic, Social and Cultural Rights*, Intersentia.

¹⁷⁸³ See Para. 4.

¹⁷⁸⁴ Under Articles 16 and 17 of the ICESCR, State Parties undertake to submit periodic reports to the Committee within two years of the entry into force of the Covenant for a particular State Party, and thereafter once every five years - outlining the legislative, judicial, policy and other measures which they have taken to ensure the enjoyment of the rights contained in the Covenant. State Parties are also requested to provide detailed data on the degree to which the rights are implemented and areas where particular difficulties have been faced in this respect. The Committee has assisted the reporting process by providing State Parties with a detailed 22-page set of reporting guidelines specifying the types of information the Committee requires in order to monitor compliance with the Covenant effectively. See Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights.

¹⁷⁸⁵ See Human rights and extreme poverty, final report submitted by Ms. Lizin, the Independent Expert, pursuant to Resolution E/CN.4/2000/52 p. 3.

positive human rights duties and if not, why not.¹⁷⁸⁶ Through review, 'the State explains and justify to the court, and therefore to the litigants and the public more generally, the grounds of its decisions and the reason for the selection of particular means.'¹⁷⁸⁷

Premising judicial review of ESC rights, the Committee has stated¹⁷⁸⁸ that, like civil and political rights, ESC rights impose the same types of obligations on States: to respect,¹⁷⁸⁹ protect and fulfil¹⁷⁹⁰ them and that failure to perform these obligations constitutes a violation of these rights.¹⁷⁹¹ Added to the above, are the obligations of conduct and of result,¹⁷⁹² and the minimum core obligations, imposed on State Parties.¹⁷⁹³

Several issues are germane to the implementation of ESC rights. For instance, while the issue of resources to implement all ESC rights might be of genuine concern; this however cannot justify State Parties like Nigeria's failure to realize these rights

¹⁷⁸⁶ See Sandra Fredman, op. cit. pp. 104 and 108.

¹⁷⁸⁷ Ibid.

¹⁷⁸⁸ See General Comment 9 (domestic application of the covenant) para 10; General Comment 12 (right to adequate food) para 15.

¹⁷⁸⁹ The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions.

¹⁷⁹⁰ The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus the failure of States to provide essential primary health care to those in need may amount to a violation.

¹⁷⁹¹ See General Comment 3 (the nature of State Parties' obligations Article 2(1)) paras 8 and 9; General Comment 12 (right to adequate food) para 15.

¹⁷⁹² See General Comment 3 (nature of State Parties' obligations) paras 8 and 9. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. The obligation of result requires States to achieve certain targets to satisfy a detailed substantive standard. In international law, obligations of conduct require the State to adopt a particular course of conduct (which may be active or passive), i.e. States should either take or refrain from taking certain measures (which may be legislative, executive or judicial). While obligations of result require States to achieve a specified result, but in doing so, they are free to adopt means they choose to fulfil the obligations. Thus, States are left with discretion under the obligations in the choice of the means they want to adopt in achieving the required result. The obligations were differentiated and adopted in order to determine the existence of a breach of an international obligation and when it has occurred. Consequently, there is said to be a breach of an international obligation of conduct, when the act or omission of the State is not in conformity with a specifically determined conduct required of it by that obligation. On the other hand, there is breach of obligation of result when the conduct adopted does not achieve the result required of it by those obligations. See María Magdalena Sepúlveda (2003), *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia Antwerp, pp. 185-186.

¹⁷⁹³ Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...]. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie* violating the Covenant." Such minimum core obligations apply irrespective of the availability of the resources of the country concerned or any other factors and difficulties. See General Comment 3 (nature of State Parties' obligations) para 10.

progressively. This is because the issue of lack of resources cannot relieve State Parties of the minimum core obligations of ESC rights.¹⁷⁹⁴ This is based on the fact that many of the obligations imposed by Article 2(1) of the ICESCR do not in all cases depend on heavy financial resources and can be implemented with relative ease, such as taking administrative, educational or other measures which does not require heavy financial commitment.¹⁷⁹⁵ All might be required in some other cases may be changes in domestic laws or institutions, especially for people being confronted by human development poverty or social exclusion, which does not require heavy financial costs.¹⁷⁹⁶ A country must however have demonstrated its best efforts in realizing the minimum core obligations and seen to be genuinely constrained by lack of financial resources.¹⁷⁹⁷

In such circumstances, a State which claims inability to comply with her treaty obligations under ICESCR has to discharge the burden that it was challenged by real lack of resource and not one borne out of unwillingness, as it is in most cases.¹⁷⁹⁸ Other acts or omissions which can constitute violations under the ICESCR apart from taking appropriate steps to implement its provisions are: the failure to reform or repeal legislation which is inconsistent with its provisions (such as section 6(6)(c) of the 1999 Constitution, which makes such rights non-justiciable); failure to enforce legislation or put into effect policies designed to implement its provisions; failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant.¹⁷⁹⁹ In this regard, the failure by Nigeria to reform its laws to make it compatible with the provisions of the ICESCR is thus a violation of this instrument and its treaty obligations under it.

An issue which is quite helpful for arguments in support for justiciability of ESC rights is the Committees' prescription of the 'minimum core obligation' rule which is deemed crucial to the satisfaction of minimum essential levels of each of the rights, despite the progressive provisions on their implementation. To argue otherwise will be to defeat the objectives of the ICESCR.¹⁸⁰⁰ This is also in line with obligations of result. The *ad hoc* working group on the draft of an international declaration on extreme poverty and

¹⁷⁹⁴ See General Comment 3 (nature of State Parties' obligations) paras 10, 11 and 12.

¹⁷⁹⁵ See David Bilchitz, op. cit. p. 129; The Maastricht Guidelines para 10.

¹⁷⁹⁶ See E/CN.4/2006/43 of 2 March 2006 second report of Arjun Segupta, the former Independent Expert on the question of human rights and extreme poverty, p.19 para 64.

¹⁷⁹⁷ See E/CN.4/2006/43 of 2 March 2006, p.19 para 64.

¹⁷⁹⁸ Ibid para 13.

¹⁷⁹⁹ Ibid.

¹⁸⁰⁰ See General Comment 3 (the nature of State Parties' obligations Article 2(1)) para 10. It was stated by the Committee that if for example a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. Any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. Ibid.

human rights in its report¹⁸⁰¹ made an important conclusion reinforcing the minimum core principle by stating that the right to life cannot be progressively realized and that failure to implement such measures would entail the death of thousands of persons.¹⁸⁰² In other words, meeting minimum essentials of ESC rights, such as rights to food, water, shelter and health are important to be fulfilled immediately, thus indicating their interrelatedness.

At the Bangalore Conference¹⁸⁰³ some of the reasons or myths why jurists have been reluctant in judicial review in the area of ESC rights have been summed up as: not being real rights of a legally enforceable kind;¹⁸⁰⁴ they are variable in content¹⁸⁰⁵ altering over time and resistant to precise legal enforcement; they are not in the specific domain of lawyers;¹⁸⁰⁶ they involve large expenditure of money and other resources for their attainment, which are better left to the government or should be made accountable to the people rather than to the courts, whose members may have neither expertise nor the information with which to make decisions of large economic significance; their attainment is more likely to involve large issues of social and political policy, in which lawyers have less role to play as professionals.¹⁸⁰⁷ The reluctance of most courts to pronounce on ESC rights is often cited as evidence that ESC rights are not suitable for legal ruling.¹⁸⁰⁸

Most of these reasons have been rebutted in one way or another. It has been rightly argued for instance that the realization of many of the civil and political rights also require massive expenditure, which has an impact on the overall distribution of resources. The examples of recognizing a right to a fair trial will mean imposing on the government the costs of running an effective criminal justice system; also, the right to

¹⁸⁰¹ The *ad hoc* working group's report set out the proposed working paper which gave prominence to the right to life, with four other basic rights of right to adequate food, drinking water, shelter and health to be components of the right to life, (see E/CN.4/Sub.2/2002/15 para 17) and that a person, or group or persons who lacked them is considered to be living in extreme poverty. The configuration is based on the fact that life needs sustenance and that those four components are required to sustain life.

¹⁸⁰² Ibid at para 22.

¹⁸⁰³ The Conference held in Bangalore, India from 23-25 October 1995 was convened by the International Commission of Jurists (ICJ), on economic, social and cultural rights and the role of lawyers, in conjunction with the Commission's triennial meeting. See E/CN.4/1996/NGO/15.

¹⁸⁰⁴ The idea that social rights are non-actionable has been described as purely ideological and not scientific, as they stand out as authentic and genuine fundamental rights that are actionable, demandable and that require serious and responsible observance. For this reason it has been said that they should be demanded as rights, and not as gestures of charity, generosity or compassion. See Flavia Piovesan, *op. cit.* p. 26.

¹⁸⁰⁵ For instance they lack determinate content and thus cannot be enforced. See David Bilchitz, *op. cit.* p. 2.

¹⁸⁰⁶ During the field study on this work, dissenting opinions were expressed by a minority of the people interviewed on the issue of making social economic rights justiciable in Nigeria. This minority argued that this should not be a matter for judicial intervention and that to make the rights justiciable will create serious economic pressure on the finances of the government.

¹⁸⁰⁷ See Bangalore Declaration and Plan of Action para 11.

¹⁸⁰⁸ During the field study of this work, most lawyers and human rights activists, including human NGOs interviewed, concurred that Social economic rights litigation has not been taken seriously by Nigerian lawyers, so there is need to articulate and canvass these issues before the courts.

vote requires the holding of regular elections.¹⁸⁰⁹ Policing and security also create burdens for taxpayers.¹⁸¹⁰ Furthermore, judges have ordered the provision of legal representation to accused persons and despite the resource implications of such orders, judicial review has never been criticized on this basis.

The question has thus been asked: ‘why then should they be criticized for ordering a state to ensure that people are provided with enough food to avoid malnutrition?’¹⁸¹¹ The reason which could perhaps be responsible for any criticism of the latter can only be premised on the fact that the latter order involves ESC rights which are regarded as inferior to civil and political rights and as such cannot be given equal status or treatment.¹⁸¹² This is in itself will be discriminatory of ESC rights and a violation of the principles of the indivisibility of rights.

The argument on resources has been carried further to say that the “size of budget consequences” that will flow from judicial review of ESC rights will far outweigh that of civil and political rights,¹⁸¹³ on the premise that “court orders enforcing ESC rights will have significant budgetary implications on nearly every occasion that the court finds against the State whereas in the case of other rights, budgetary impact will be a more occasional or less severe consequence of the order”.¹⁸¹⁴

But a counterargument has been advanced to the effect that it is not true that every order of court in respect of ESC rights will necessarily have budgetary implications. The example of enforcing negative duties, such as preventing the State from demolishing houses or embarking on forced evictions have been correctly stated as attracting no major budgetary implications, and that even in enforcing the positive duties, the type of budgetary implications that may flow from these will depend on the particular order that is made.¹⁸¹⁵

It has also been stated that ‘it is not clear that there is necessarily a significant difference in all societies between amount spent on the positive obligations imposed by civil and political rights as opposed to those imposed by ESC rights.’¹⁸¹⁶ The point to be noted however is that even where it is proved that the budgetary implications of implementing positive obligations of ESC rights outweighs those of civil and political rights, based on the principle of the indivisibility of rights, it will be inappropriate to sever such budgetary implications from the total budgetary implications of the whole body of rights. This is anchored on the premise that the cost of enforcing one civil and political

¹⁸⁰⁹ See David Bilchitz, op. cit. p. 129.

¹⁸¹⁰ See Maggie Beirne, “Social and Economic Rights as Agents for Change”, in Collin Harvey (ed.) (2005), *Human Rights in the Community: Rights as Agents of Change*, Heart Publishing, p. 47.

¹⁸¹¹ See David Bilchitz, op. cit. p. 129.

¹⁸¹² Ibid.

¹⁸¹³ Ibid.

¹⁸¹⁴ Ibid.

¹⁸¹⁵ See David Bilchitz, op. cit. p. 129; the author gave an example that an order of court for the extension of an existing feeding scheme, for instance, may cost less than the creation of a new feeding programme.

¹⁸¹⁶ Ibid.

right against another is never taken into consideration by the government as the determinant factor of their enforcement; such as weighing the cost of right to liberty vis-à-vis the right to fair trial or right to vote. To do so against ESC rights will be flawed and will be nothing but a continuation of the age long discrimination against this class of rights.

The arguments on budgetary consequences of implementing ESC rights are too narrowly focused without weighing up the possible gains to be made from this. As noted in this work, rights are interrelated and possess great potential to rub off on each other, such that implementing ESC rights has the possibility of reducing crime, conflicts, ill-health and other social problems. This will in turn reduce the cost of crime control/prevention and cost of conflict control, which in most cases have economic undertones as well as the cost of maintaining an efficient administration of justice system by providing adequate legal representation, prisons and inmates. The example of the State of Kerala in India, given by Sen as referred to above, indicated that implementation of social welfare led to high literacy rate, improvement in health and ensured increased life expectancy for the people. A healthy population will consequently cost the government less on health. Funding education will reduce the incidence of people dropping out of school and vulnerability to crime or anti-social behaviour.

On the other hand, if it is accepted without conceding, that budgetary implications of enforcing some of the positive obligations of ESC rights, then this has no nexus whatsoever with the question of judicial enforcement of those rights.¹⁸¹⁷ It has further been buttressed that, it is where there are significant budgetary consequences that the judiciary needs to be vigilant to ensure that fundamental interests of the individuals are protected as it is in these circumstances that governments are prone to refuse to protect these interests.¹⁸¹⁸ However, where claims of resource scarcity are genuinely made as the ground of inability to satisfy a positive obligation of ESC rights in a case which is before a court, it has been suggested that judges may have to consider in appropriate cases to align with the decisions reached by other branches of the government.¹⁸¹⁹

However in some cases, it might be necessary for the court to inquire into the overall budget allocations to see if sufficient funds are allocated to meet core obligations imposed by ESC rights.¹⁸²⁰ Also, it has been suggested for instance that, where the court is unable to come to a particular decision on an ESC rights claim, which concerns the issue of allocation of resources, as a result of the court's lack of expertise, such matter

¹⁸¹⁷ Ibid at p. 130.

¹⁸¹⁸ Ibid.

¹⁸¹⁹ See David Bilchitz, op. cit. p. 130; In *Soobramoney v. Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) for instance, the South African Constitution Court upheld the State's claim of lack of resources to provide regular renal dialysis for an applicant who suffered from kidney failure and to all those suffering from renal failure. The Court recognized in that case that obligations imposed on the country by the Constitution are contingent upon resources, which are themselves scarce. The Court noted that to provide the applicant and those in similar situations with the type of treatment would be too expensive.

¹⁸²⁰ See David Bilchitz, op. cit. p. 232.

can be sent back to the executive for reallocation in order to meet the priority in question.¹⁸²¹ In other words, where the court is hesitant to make a specific order because of uncertain budgetary consequences, it can rely on the executive's expertise in this regard and request it to re-examine the claim and make the necessary allocation in respect of the same.

A summation of the above is that judicial duties with respect to enforcement of ESC rights will not differ materially to those performed under civil and political rights.¹⁸²² The examples of India already examined in this work, South Africa¹⁸²³ and other jurisdictions have given the lie to the claim that these rights are not suitable for judicial review.

Apart from the above, other points in support of justiciability and judicial review of ESC rights are that, determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature;¹⁸²⁴ there are a lot of provisions in the ICESCR that are capable of immediate application and are not contingent upon massive resources¹⁸²⁵ and are thus appropriate for judicial review and other recourse procedures;¹⁸²⁶ it may on occasion be able to ascertain that there are already sufficient resources in the coffers and that such competing needs would not be prejudiced by an order requiring the provision of some service.¹⁸²⁷ In other cases, it will have the power to pronounce upon a clear mis-allocation of resources and order that this be remedied.

¹⁸²¹ Ibid at p. 131, the author informs us that this order was made on *Grootbooms*' case.

¹⁸²² Ibid at p. 129.

¹⁸²³ In *Government of the Republic of South Africa v. Grootboom*, ([2001] (1) SA 46 (CC)) the court stated among others that all the rights in South Africa's Bill of Rights are inter-related and mutually supporting and that there can be no doubt that human dignity, freedom and equality, the foundation values of our societies, are denied to those who have no food, clothing or shelter. Affording ESC rights to all people therefore enables them to enjoy other rights enshrined in Chapter 2 of the South African Constitution and that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. South Africa's Constitutional Court in that case held that the then existing housing plan was not reasonable in that it did not provide any form of temporary relief to those in desperate need or living in crisis situations. Also, in *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) where the issue centred around the South African government's policy of confining the provision of nevirapine, an antiretroviral drug that reduces the likelihood of HIV transmission from mother to child at birth to a number of research and training sites in that country, thus hindering access to the drug, the Constitutional Court decided that such restriction of the drug to the research sites only on the ground that comprehensive package was not available at other public health institutions was unreasonable in view of medical evidence that nevirapine could still be effective even if administered without the full package of breast-milk substitutes and support services. This was despite the fact that the drugs were made available free of charge by the manufacturers for five years. The Court ordered the government to make the drug available at other public hospitals and to train counsellors in the administration of the drug.

¹⁸²⁴ See General Comment 3 (nature of State Parties' obligations Article 2(1)) para 5; General Comment 9 (the domestic application of the Covenant) para 11.

¹⁸²⁵ See Articles 2(2) on non-discrimination, 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3); see General Comment 3 (nature of State Parties' obligations Article 2(1) para 5.

¹⁸²⁶ See General Comment 9 (the domestic application of the Covenant) paras 10 and 11.

¹⁸²⁷ *The Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) order provides an example of such a case cited in David Bilchitz, op. cit. p. 131.

One of the categories of justifications for judicial review has been termed ‘rights-based’ justification. This view involves the claim that there are fundamental rights that must be guaranteed to all individuals in any just society, whether or not the majority agrees or wishes to recognize these rights. Certain institutional features of the courts render them more likely to provide adequate protection for such rights than a representative institution such as the legislature. As a result, it has been suggested ‘we should assign the power to protect rights to judges, who are justified in overruling decisions of the majoritarian institutions where these conflict with fundamental rights.’¹⁸²⁸ Added to this, is the argument that applications of human rights standards are familiar terrain to judges who thus have the requisite expertise to evaluate the allocation of resources in these areas: this is a critical point said to be missed by many writers.¹⁸²⁹

Judicial review will also ensure victims access to effective and adequate remedies, such as restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition¹⁸³⁰ at national and international levels,¹⁸³¹ and certain orders such as prohibition, *mandamus*, *quo warranto* and *certiorari*, which are only comprehensively available judicially.¹⁸³² Administrative bodies, even where available cannot effectively make some of such orders or remedies.

Furthermore, since intervention at the international plane is contingent on the exhaustion of all local remedies,¹⁸³³ justiciability and access to judicial remedies in respect of breach of ESC rights therefore becomes imperative. However, a communication may be admissible where local remedies have not been exhausted, where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.¹⁸³⁴

Support for judicial review in respect of ESC rights has been further reinforced by the contention that, making ESC rights justiciable does not necessarily mean that judges will take over the role of drawing up the budgets ‘themselves without regard to the expertise of the legislature and the executive’;¹⁸³⁵ judicial intervention will lead to important improvements in policy for those who are most needy and vulnerable.¹⁸³⁶ A further contention along this line is that, the political process itself where it ‘involves high interest bargaining, is highly susceptible to domination by the elites, whereby minorities are excluded or their vote is silenced’ and that ‘justiciable positive rights are capable of correcting rather than reinforcing inequality.’ And that since the ‘key aim of

¹⁸²⁸ See David Bilchitz, op. cit. p. 105.

¹⁸²⁹ See David Bilchitz, op. cit. p. 132.

¹⁸³⁰ See General Comment 9 (the domestic application of the Covenant) para 10; The Maastricht Guidelines para 23.

¹⁸³¹ Ibid at para 22.

¹⁸³² See General Comment 9 (the domestic application of the Covenant) para 10.

¹⁸³³ See on admissibility or communications, Article 4(1) of the Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights annexed to A/HRC/8/WG.4/3 OF 25 March 2008.

¹⁸³⁴ Ibid.

¹⁸³⁵ See David Bilchitz, op. cit. p. 131.

¹⁸³⁶ Ibid at p. 132.

positive duties is that individuals are able actually to exercise their rights and to remedy inequalities within political process', it is the democratic role of the judiciary to remedy the deficit within the process through review.¹⁸³⁷

The decision of the African Commission on Human and Peoples' Rights (ACHPR) in *SERAC & CESR v. Nigeria*,¹⁸³⁸ reinforced the view of the Committee¹⁸³⁹ that, internationally accepted ideas of the various obligations under ESC rights involved four layers, i.e. duty to respect, protect, promote and to fulfil. It affirmed that the last layer of obligation that States are required to fulfil is more of a positive expectation on the part of a State to move its machinery towards the actual realization of the rights and that this could consist of the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).¹⁸⁴⁰ The African Commission has however been accused of not paying enough attention to implementation of ESC rights 'on a continent with pervasive poverty and mass deprivation'.¹⁸⁴¹

The decision of the Nigerian Supreme Court in *Abacha v. Fawehinmi* (supra) has been criticized for refusing to uphold ESC rights, on the ground that the courts should have inquired into the intention of the legislature by domesticating the African Charter without reservation. It has also been rightly argued that no man builds a stately habitation unless he means to dwell there, and that it is the right of Nigerians to demand their government to fulfil its obligations with respect to all categories of rights guaranteed therein.¹⁸⁴² The attitude of Nigerian courts of not giving liberal construction to the Constitution and the African Charter have been attributed to their non-familiarity with international law, which is said to be responsible for their continued drawing of artificial distinctions between civil and political rights, and ESC rights, indeed, 'in a country where majority of the population are seared by the fever of poverty'.¹⁸⁴³

It is on this premise of lack of appreciation by judges with the terms and objectives of the ICESCR that the Bangalore Conference resolved that there is need to sensitize 'judges, lawyers, government officials and all those concerned with legal institutions on those rights, its mechanism and generally on human rights'.¹⁸⁴⁴ It was also resolved that the judges should play a greater part in the realization of ESC rights than they have in

¹⁸³⁷ See Sandra Fredman, op. cit. pp. 107 and 109.

¹⁸³⁸ Ref. ACHPR/COMM/A044/1 para 47. In that case Nigeria was held to be in breach of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter for permitting oil exploration in Ogoni land and degrading the environment.

¹⁸³⁹ See General Comment 3.

¹⁸⁴⁰ Ref. ACHPR/COMM/A044/1 para 47.

¹⁸⁴¹ See Chidi Anselm Odinkalu, "Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights", in Malcolm D. Evans and Rachel Murray (eds.) (2002), *The African Charter And Peoples' Rights: The Systems in Practice, 1986 – 2000*, Cambridge University Press, p. 216.

¹⁸⁴² See Nsongurua J. Udombana, "Nigerian Courts' Construction of Human Rights Norms: Liberalism or Narrow-mindedness?", in I.O. Smith (ed.) (2004), *Law and Development in Nigeria*, Ecowatch Publications (Nig.) Ltd., p. 144.

¹⁸⁴³ Ibid p. 140.

¹⁸⁴⁴ See Bangalore Declaration and Plan of Action para 18.1.

the past.¹⁸⁴⁵ It was also stated that universities, law colleges, judicial training courses and the general media have a responsibility to promote greater awareness of such rights and their legal content, and should be encouraged to assume this responsibility.¹⁸⁴⁶

Although the ICESCR is handicapped by lack of a complaint procedure to monitor bodies' breaches of it, the possibility of having this is getting nearer by the day as there is currently an Optional Protocol to ICESCR in the pipeline.¹⁸⁴⁷ The Chairperson of the Open-ended Working Group on the optional protocol, after a first draft has further prepared a second revised draft which had been considered during the second part of the fifth session of the Open-ended Working Group on an optional protocol to the ICESCR held from 31 March to 4 April 2008¹⁸⁴⁸ and there was optimism that the new revised draft will assist to finalize negotiations on the optional protocol.

The Revised Draft Optional Protocol among others provides for the submission of communications on behalf of individuals or groups claiming to be victims of violations of any of the rights set forth in Parts II and III which is to be read in conjunction with those contained in Part II of the ICECSR.¹⁸⁴⁹ Some of the unique features of the Draft Protocol are the ones providing for follow-up to reviews of the Committee, under which the State Party may be required to give, preferably within a period of six months a written response, including information on any action taken in the light of the views and recommendations of the Committee.

The Committee may further invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations.¹⁸⁵⁰ Also, under Article 5(1) the Committee can make an urgent request to a State Party that it take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation even before a communication is determined on its merits. These are quite similar to the features of the Indian PIL.

Others are provisions for friendly settlement by parties to be facilitated through the office of the Committee (this will enable the parties to settle on equal terms if need be), and for a setting up of a trust fund for purposes of assisting individuals or group of individuals to submit communications under the protocol.¹⁸⁵¹ This is a recognition that

¹⁸⁴⁵ Ibid at para 11.

¹⁸⁴⁶ Ibid.

¹⁸⁴⁷ The Human Rights Council in its Resolution 1/3 gave the Open-ended Working Group a two-year mandate to draft an optional protocol to the International Covenant on Economic, Social and Cultural Rights, consequent upon which Catarina de Albuquerque, the Chairperson-Rapporteur of the Working Group submitted a first draft of the optional protocol (A/HRC/6/WG.4/2) to the fourth session of the Working Group (16-27 July 2007). The Chairperson-Rapporteur prepared a revised draft (A/HRC/8/WG.4/2), which the Working Group considered at the first part of its fifth session (4-8 February 2008).

¹⁸⁴⁸ See Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights annexed to A/HRC/8/WG.4/3 OF 25 March 2008.

¹⁸⁴⁹ See Article 2(1). See Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights annexed to A/HRC/8/WG.4/3 OF 25 March 2008.

¹⁸⁵⁰ See Article 8 bis (2) and (3) of the Revised Draft Optional Protocol.

¹⁸⁵¹ See Article 14(1).

economic impediments may act as obstacles to poor people accessing effective remedies under the provisions of the protocol and thus reinforces the human rights approach of access to justice as the poverty reduction strategy conceptualized by this work.

However, one provision that may lead to problems in the future is the one contained in Article 7(1), which provides that when examining a communication under the Protocol, the Committee shall consider, where relevant, the reasonableness of the steps taken by a State Party in conformity with Article 2, paragraph 1, of the Covenant, and that in doing so, the Committee will respect a margin of discretion of a State Party to determine the appropriateness of policy measures as long as they are consistent with the provisions of the Covenant.

What may lead to controversy later in this interpretation of this provision is whether the importation of the word ‘reasonableness’¹⁸⁵² by the Draft Protocol means that it is the benchmark now to be used in determining compliance by State Parties with the provisions of the ICESCR, while the current requirement of the ‘minimum core obligations’ principle as noted above is to be jettisoned. This is particularly based on the fact that the ‘reasonableness’ approach adopted by the Constitutional Court of South Africa in *Grootboom’s* case has been dealt a mortal blow and rejected, with the contention that the minimum core obligations approach is to be preferred.¹⁸⁵³ It is therefore necessary for the Open-ended Working Group on the optional protocol to address its mind to this and reconcile the two approaches.

International human rights law is weak in terms of enforcement and implementation. Mechanisms are equally weak in providing remedies and worse still, is the fact that

¹⁸⁵² As done by the Constitutional Court of South Africa in *Government of the Republic of South Africa v. Grootboom* (supra) which used the criteria of “reasonableness” to review the government’s housing policy.

¹⁸⁵³ The minimum core obligation approach has been said to be preferred and the notion of ‘reasonableness’ as used by the court in that case has been criticized as being theoretically deficient. This is said to be based on the fact that ‘reasonableness’ is a well-defined notion, and that the reasonableness test itself would lead to recognition of a minimum core obligation based on the finding of the Court that it is unacceptable for people in desperate need to be left without any form of assistance with no end in sight. The minimum core obligation would have had the benefit that the State would have been provided with a more definite standard against which to judge its behaviour, instead of being implored to be ‘reasonable’ to provide for those in desperate needs. See David Bilchitz, op. cit. pp. 142, 145 and 150. The bedrock of the flaw in this approach has been anchored on the following: 1. Reasonableness alone lacks the content necessary to determine on matters concerning ESC rights, thus leading to decisions that are not adequately justified. 2. It deflects the focus of the constitutional enquiry from the urgent interests at stake in these cases and allows these to be overshadowed by a general balancing of multiple considerations. 3. The vagueness of the notion does not help provide any certainty as to the nature of the government’s obligations in terms of the Constitution. 5. Reasonableness does not provide principled criteria to determine the circumstances in which it is legitimate for judges to interfere with the decisions of other branches of government. 6 As a result of its vagueness, reasonableness is used to perform distinct normative tasks which are often conflated, thus leading to errors in decision-making and a complex, confusing array of enquiries being included within its ambit. See David Bilchitz, op. cit. p. 176.

domestic courts are mostly reluctant to give full effect to them.¹⁸⁵⁴ It is thus anticipated that the Protocol will pay due attention to a more cohesive enforcement power, in order to make State Parties comply with their obligations. Also, action should be expedited on this Protocol and it is hoped that when finalized, it will be adopted without delay.

Pending the time ESC rights are made justiciable in Nigeria (and the Draft Protocol finalized and adopted, in the hope that Nigeria will assent to it and in good time, which will then give Nigerians opportunity to have recourse to international remedies), it has been suggested that the way out of the current dilemma is for the bar and the bench to use the provisions of Chapter II together with those of Chapter IV in a community way, as done in other jurisdictions (e.g. India, Ghana and Uganda.) with similar provisions, where the courts have applied the provisions of their own Chapter II, which is by reading them in conjunction with other enforceable parts of the Constitution.¹⁸⁵⁵

Another possible interim measure is if the Supreme Court of Nigeria reversed its decision in *Abacha v. Fawehinmi* (supra), in a subsequent case - then the provisions of the African Charter on ESC rights can be enforced, pending domestication of the ICESCR. The possible lasting solutions will however be as follows:

- 1.) To amend section 6(6)(c) which makes such rights non-justiciable, to allow the enforcement of such rights as may be provided by any other domestic law, so that those in the African Charter (and those of the ICESCR when domesticated) can then be enforced.
- 2.) By constitutional amendment which will directly incorporate the provisions of the ICESCR, which will now replace provisions of Chapter II of the 1999 Constitution, while section 6(6)(c) will be removed from the Constitution. A constitutional amendment will rank ESC rights equally with civil and political rights in Chapter IV.
- 3.) To amend section 12 of the 1999 Constitution to permit direct enforcement of ratified treaties, as operating under the monist system.¹⁸⁵⁶

There is however, a welcome development of judicial evolution of a new trend towards the application of treaty standards in domestic law, as being done in the commonwealth Australia, the Caribbean, Zimbabwe, New Zealand and South Africa, thereby rendering the issue of non-incorporation less and less important.¹⁸⁵⁷

¹⁸⁵⁴ See Koen De Feyter and Felipe Gomez Isa, "Privatisation and Human Rights An Overview, Privatization and Human Rights" in Koen De Feyter and Felipe Gomez Isa (eds.) (2005), *The Age of Globalisation*, Intersentia, p. 6.

¹⁸⁵⁵ See Chinonye Obiagwu and Chidi Anselm Odinkalu, "Combating Legacies of Colonialism and Militarism", in Abdullahi Ahmed An-Na'im (ed.) (2003), op.cit. p. 226.

¹⁸⁵⁶ See Edwin Egede, op. cit. p. 278.

¹⁸⁵⁷ See Constitutional Rights Project, Legislative Agenda for Legal Reforms and Human Rights, 2002, p. 12; In *Rajasthan Vishaka & Others v. State of Rajasthan & Others*, [AIR 1998 SC 3011] the Supreme Court of India held that the government of that country must observe the CEDAW since it had ratified it, notwithstanding that the instrument had not been domesticated.

5.4 Conclusion

The indivisibility of rights is the best way to promote and protect all human rights, based on their interrelatedness. Confining ESC rights to aspirational goals of government is grossly deficient and should be treated with equal status as civil and political rights. Arguments against justiciability are not well founded as shown above and State Parties should be made to fulfil their treaty obligations on the same. It is essential for States to fulfil their obligations through budget and policies.¹⁸⁵⁸ Making ESC rights justiciable and implementing them in Nigeria and other countries being confronted by severe poverty becomes compelling, as these rights have great potential to guarantee basic necessities of life and human dignity to the poor. It has been said that ‘if executed as written, ESC rights would result in a redistribution of existing patterns of income and wealth towards the lower income earners and wealth holders,’¹⁸⁵⁹ through which the poor can free themselves from the clutches of poverty.

Human rights will cease to have any probative value if they cannot be enjoyed and enforced, especially at the domestic level. Impunity will make the idea of rights utopian.¹⁸⁶⁰ ‘State Parties agree unconditionally to guarantee rights to individuals. The beneficiary of a right should be able to enforce its efficacy. And the easiest way for an individual to enforce his rights is before his own courts, and not before an international tribunal.’¹⁸⁶¹

¹⁸⁵⁸ See the UK’s Department for International Development (DFID), op. cit. p. 8.

¹⁸⁵⁹ See Jeffrey Harrod, “The Politics of Economic and Social Human Rights”, in Karin Arts and Paschal Miho (eds.) (2003), *Responding to the Human Rights Deficit: Essays in Honour of Bas Gaay Fortman*, Kluwer Law International, p. 62.

¹⁸⁶⁰ See E/C.12/2001/10 of 10 May 2001 Poverty and the International Covenant on Economic, Social and Cultural Rights, para 14.

¹⁸⁶¹ See Rosalyn Higgins, “The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom”, in Benedetto Conforti and Francesco Francioni (eds.) (1997), op. cit. p. 38.

CHAPTER 6

GENERAL CONCLUSION

6.1 Overview

This research work examines the research question ‘Poverty: Legal and Constitutional Implications for Human Rights Enforcement in Nigeria.’ In other words, it analyzes the theoretical and practical implications of poverty for the enforcement of the human rights of the poor in Nigeria, from a constitutional and legal point of view. This work therefore examines the problems facing the poor in enforcing or realizing their human rights. Pointing out the problems will be insufficient without proffering possible solutions. This work thereby as one of its research aims, examines ways by which the poor can effectively protect their rights, in a manner that will empower them and enable them to break the cycle of poverty through a rights-based approach to poverty reduction.

As a starting point, this work in Chapter I examines the problem of global poverty as one of the greatest challenges of the twenty-first century and analyzes some of the various definitions of the term. From the lack of human rights enjoyment due to poverty on the grounds of lack of capacity, resources and power on the part of the poor for instance, to the international consensus that extreme poverty and exclusion constitutes a violation of human dignity, to the assertion that poverty is a denial of human rights as a whole have been examined. All of these have contributed to focusing on the serious negative implications of poverty on human rights enjoyment, which are also intrinsically linked to the problems of human rights protection.

Furthermore, this work examines some of the rights-based international approaches to poverty reduction and their human-rights content, which emphasize among others, the respect and protection of human rights, tackling inequality and discrimination, observance of the rule of law, distributive justice, access to justice, reforms and design of social services targeted at the poor. The various suggestions/recommendations accentuate and align with the research objective of the quest for an effective means of protecting the human rights of the poor and at the same time serving as a viable human rights-based approach to poverty reduction.

This work also considered in Chapter II, the scourge of poverty in Nigeria going by international and national reports, including the fieldwork conducted in Nigeria and examines the indices of poverty in the country, characterized chiefly by poor human development index, which in itself paints a picture of gloomy poverty. While a dissection of the impacts of poverty on some of the human rights in Nigeria is illustrative of the non-enjoyment of human rights by the poor, the exposition on the right to fair hearing, right to participate, right to freedom from discrimination and right to effective remedy, distinctively conflates the research question of the implications of poverty on the enforcement of human rights in Nigeria and the problem of the right of access to justice. The problem of lack of access to justice itself dealt a mortal blow to the human rights of the poor in Nigeria; this allowed violations and impunity to feast on

their rights. Thus, Chapter II of this work effectively contributes to the research question by laying bare the impacts of poverty on the enforcement of human rights in Nigeria, which this work seeks to analyze.

This work progresses further the research question in Chapter III by examining the legal framework for the enforcement of human rights in Nigeria and chronicles the main challenges posed by poverty in the enforcement and protection of human rights in Nigeria. Categorizing issues such as costs associated with access to enforcing rights in court, rule of *locus standi*, lack of assertiveness, corruption, inefficient administration of justice, among others, and the inadequacy/limitations of the existing measures in Nigeria, Chapter III of this work paints a picture of the problems of enforcing human rights by the poor in Nigeria, which is the main issue that this work seeks to address.

Chapter III of this work also dwelled on the human right of access to justice and the importance of this right both in protecting human rights and as having great potential in poverty reduction measures. The crucial nature of this right is emphasized by analyzing treaty provisions, case law from various jurisdictions and literature on access to justice, especially the work of the Worldwide Movement on Access to Justice. This chapter also examines the international and regional efforts aimed at facilitating access to justice for the poor.

The expansive interpretations given to the right of access to justice in the case law of several jurisdictions for instance as considered in Chapter III, goes to emphasize the importance of access to justice not only because of its crucial nature as a vehicle of protecting other rights, but as vital to the rule of law and proper functioning of society. This has informed the judicial practice of pulling down the perceived barriers on the road to access to justice, in order to ensure access to legal justice, the machinery of justice and justice. The case law also addresses the need not to allow financial impediments to obstruct the exercise of this right, especially by the poor. The guarding of the right of access to justice zealously by the judicial arm, through narrow interpretation of any law that seeks to impair its exercise further indicates its primacy as a human right and equally as a means of human rights protection.

The increasing interest of those in the international development and finance circles concerned with the question of access to justice, and which join the spirited efforts aimed at facilitating access of the poor and disadvantaged groups to justice, is testimony to the perceived potential of the access to justice approach to significantly contribute to poverty reduction measures and as a source of empowerment for disadvantaged groups through rights protection.

Chapter III also focuses on the underlying reasons for the Access to Justice Movement's emphasis on the need to facilitate access to justice for the poor and disadvantaged groups by which it encapsulates key elements of this right as being instrumental to human rights protection and as a procedural means to safeguard the rule of law. Access to justice for the underprivileged is also conceived as a means of delivering social benefits. This work of the Access to Justice Movement in pushing for reforms

underscores the need to make rights entrenched in the law realizable and to overcome structural and practical barriers to the enforcement of rights on behalf of the 'have nots', by the demand for better and more efficient enforcement mechanisms.

In keeping with the research objective of articulating ways of ensuring effective enforcement of human rights for the poor in Nigeria towards a human rights-based approach to poverty reduction, this work in Chapter IV attempts this task. As a prelude, this work touches on frustrations that the lack of access to justice foists on the poor, a situation which makes the poor fall deeper into poverty. The necessity of having an efficient legal regime for the enforcement of human rights, which is accessible to the poor is also examined. It was observed in this part that in spite of the concurrence on the need to facilitate access to justice for the poor, the details of what should serve as models in adjectival laws remains sketchy.

In continuation of Chapter IV, this work enumerates the importance of access to justice as essential for human development, establishing democratic governance and conflict prevention. This work carries the argument that in the absence of access to justice by all, democracy is undermined and that if disadvantaged people can access justice, they will be able to obtain remedies which will mitigate the impact of crime and illegality on their lives. When ordinary people are able to access fair and effective justice systems, risks of violent conflict will be reduced. Impunity which often accompanies the violation of rights of the poor and the injustices committed against them will be eliminated through access to effective justice systems, and violators will be deterred. This will also enable people to repose confidence in the justice system to resolve disputes, thereby preventing situations of people taking the law into their own hands and to shun 'jungle justice'.

The quest for articulating possible ways of ensuring an effective right of access to justice by the poor as a means of insulating their rights and empowering them has resulted in the propositions in this work of a two-pronged rights-based approach of access to justice for the poor. One is the proposal of the Indian Public Interest Litigation (PIL) model and second, the introduction of Alternative Dispute Resolution (ADR) mechanisms. These aim at developing pro-poor enforcement mechanisms with the potential of granting equal and effective access to justice for the poor and thus, through a rights-based approach at combating the scourge of poverty in Nigeria.

The proposal of the Indian PIL as a model for Nigeria is based on the fact that it is pro-poor and that it has unique features of flexibility and liberalization, which have enabled the model to offer access to justice to the teeming poor and the deprived sections of the Indian community. The added experience of the Indian model in pulling down access and procedural barriers, and evidential difficulties in a legal system similar to that of Nigeria motivates this proposal. The fact that the Indian model has also matured and transcended from an experimental stage into a comprehensive doctrine makes this model appealing to this work. The Indian experience of dealing with the problems of accessing justice by the poor and the ability of the judiciary to use the model to enforce fundamental rights for the poor through innovative interpretations, make the model unique and suitable for the Nigerian situation. The expanded interpretations given by the

courts to constitutional provisions make some of the rights meaningful to the poor, and rights not expressly recognized by the Indian Constitution – as in the Nigerian Constitution - are also enforced in an indirect manner.

Another special feature of the Indian PIL, the non-adversarial nature of litigation has been buttressed in this work as a veritable feature of an enforcement mechanism that is suitable for the poor in enforcing their rights as against the adversarial system of litigation in practice in Nigeria and in most common law countries, which makes access to justice difficult and almost irrelevant in the lives of the poor, and does not guarantee the quality of justice. It has been argued by this work that the Indian PIL mechanism stands to remove the perennial obstacles that the poor have in accessing justice in Nigeria and in addition has the potential to enhance the quality of justice rendered.

The supervision by the Indian Court of its own orders is another essential feature, as the Court by this practice has prevented possible frustrations of its orders, especially where the State authorities may want to resist the enforcement of such orders. Rights, it has been noted, will be illusory if a final binding judgment remains inoperative to the detriment of the successful party, thus leading to a denial of effective justice. Emphasizing the importance and timeliness of the execution of judgments as an important component of access to justice and rights protection, the European Court on Human Rights in *Hornsby v. Greece* (supra), held that right would be illusory if the domestic legal system allows a final binding judicial judgment to remain inoperative to the detriment of one party. The Court held further that such a situation is incompatible with the rule of law. In other words, the Court demonstrates as noted above that the execution of judgments is an essential element of the right of access to a court, otherwise, the essence of access to court guaranteed by law and its judicial protection are rendered meaningless.

This work also suggested in Chapter IV, a modification of the Indian PIL model to be adopted by making the courts sit in circuits in Nigeria as a means of bringing justice nearer to the people in the rural areas and of affording cheap access by eliminating costs related to attendance at courts and transportation of witnesses. The importance of this can be seen from the fact that issues such as transport cost to and from courts keep the poor away from using the legal process. This must have been one of the reasons behind the African Commission's provision in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, meant to facilitate access to justice, adopted in 2001 under Section K(a) and (d), that States shall ensure that judicial bodies are accessible to everyone and that such access is not impeded by situations such as the distance to the location of judicial institutions.

The second mechanism proposed is the introduction of ADR, through the use of Nigeria's National Human Rights Commission as an institutional vehicle for the provision of efficient, flexible and cheap legal means of accessible justice for the poor in the enforcement of their rights. Bearing in mind the criticisms of ADR, especially that of being likely to discourage the disadvantaged from asserting their legal rights, this work has advocated that the ADR mechanism be used for less serious human rights

violations and that safety nets be built into the model of ADR proposed, in order to insulate it from possible abuses. This work has contended for instance that ADR should be voluntary and that parties should be able to contest any outcome in court without the imposition of a fine.

The proposals made herein for the purpose of facilitating enhanced and equal access to justice for the poor for the ultimate realization of their human rights and poverty reduction in Nigeria can be implemented through legal and judicial reforms as noted above. Key among these are the removal of access, procedural and evidential difficulties which can be achieved either through necessary statutory modifications or by the apex Court of Nigeria through activism, by construing fundamental rights provisions liberally and innovatively. The apex Court in Nigeria by virtue of the doctrine of precedent and the common law system in operation in the country stands in a pivotal role to engage in subtle judicial law making through case law. There may however be the need to sensitize judges on the special difficulties of the poor in accessing justice, the need to protect and be sensitive to their peculiar situations in the performance of their tasks and generally arouse their activism consciousness through seminars, conferences and special training programmes.

The important role of the court as a modulator, as an agent of social engineering and as the proverbial last hope of the common man, has been further challenged by the model of access to justice proposed by this work, which the judiciary can activate to give justice to the teeming poor in Nigeria. This will boost the poor's confidence in the Nigerian judiciary as well as their belief in human rights, thereby deepening a human rights culture in the country. A former Australian Chief Justice, Sir John Latham, said that 'it was comparatively easy for legal systems to uphold the rights of majorities and the powerful. The real test comes when they are asked to protect the vulnerable, minorities and the weak.'¹⁸⁶² This is a serious challenge for the Nigerian judiciary to uphold the rights of the poor and afford them justice. In the same vein, the proposal for the use of ADR can be implemented by statutory reforms in the enabling Act of Nigeria's National Human Rights Institution and providing necessary institutional frameworks.

This work therefore entrenches the need for conceptualizing appropriate mechanism(s) which the poor can galvanize in order to claim their rights, demand accountability for actions and/or policies of the government that affect their lives and bring violators of their rights to account, as germane to a rights-based approach of access to justice in poverty reduction. The pro-poor mechanism conceptualized in this work also holds promises for other developing countries confronted by the problem of mass poverty as in Nigeria. This work has therefore shifted attention from the prescriptive or normative nature of human rights to practical implementation at the national level, especially for the poor. The importance of the realization of human rights as crucial to the empowerment of the poor and poverty reduction as conceived in the human rights-based approaches cannot be overstretched.

¹⁸⁶² See UNDP (2005), *Programming Justice: Access for all, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, p. iv.

An issue which this work conceives as vital to human rights enforcement and as a means of broadening access to justice as dealt with in Chapter IV, is that of human rights education. The problem of ignorance/illiteracy has been indicated earlier in this work as one of the problems militating against the enforcement of the rights of the poor. Noting the problem of illiteracy in Nigeria, the World Programme for Human Rights and the absence of a national plan for human rights education in Nigeria, this work conceives as important the building of a culture of human rights awareness through human rights education. Since the poor in most cases have no idea of their rights, the importance of information and education for the poor and the use of simple message techniques, such as handbooks, cartoon strips providing information about their rights and available services cannot be overemphasized. This is more so, as people can hardly be expected to protect rights which they are ignorant of. Rights education will therefore empower the poor to increase their propensity to enforce their rights.

In light of the above, this work therefore advocates sustained and aggressive integrated human rights education targeted at all segments of Nigerian society, especially the poor and vulnerable groups. The translation of human rights treaties on civil, political, economic, social and cultural rights, and of Chapter IV of the Nigerian Constitution into local languages was also advocated as a means of deepening human rights consciousness. The protective advantage of human rights education as a means of preventing abuses rather than being reactive or remedial is also emphasized as informing the need to prioritize human rights education in rights protection regimes.

The issue of inordinate delays associated with litigation and court processes in Nigeria generally necessitated the suggestion for judicial reforms in the court systems in Nigeria, as the last issue examined under Chapter IV of this work. The shortening of the length of the judicial ladder which prospective litigants need to traverse in order to enforce their rights in Nigeria is considered. Thus, this work advocates either the elimination of the middle court in the hierarchy of superior courts in Nigeria or the creation of a Constitutional Court, which can entertain appeals on constitutional and human rights issues. It was noted in that chapter that India for instance with its huge population has no middle court in between the High Courts and the Supreme Court. The same goes for South Africa. In view of the very slow pace of administration of justice in Nigeria, the middle court may further prolong delays. The necessity for a total overhaul of the justice system, including procedure that would ensure fast-track justice delivery was canvassed.

Advocating justice and legal system reforms in this work is a result of the fact that these are also essential to development and poverty reduction, based on the recognition that an efficient legal system promotes economic growth. Such reforms will not only encompass the use of the PIL model as proposed in this work but also involve a reform of the judicial institutions in terms of the structure of the courts, strengthening capacity and improving the services which are necessary in order for the pro-poor mechanism of access to justice to have the desired effects. Justice reform itself has been concerned with moves towards strengthening the capacity of justice institutions and improving

them, so that the poor will be able to use them for the effective realization of their rights and consequently free themselves from the yoke of poverty.

Such judicial and legal reforms should however be comprehensive to include the issue of filing fees. This work posits for instance that it constitutes discrimination against the poor, the requirement of the payment of filing fees as a condition to access the courts in order to enforce human rights, as this makes access to courts contingent on the ability to pay. This work therefore argues that providing access to the courts to enforce rights should be free for those who do not have the means to pay, and that where the suit includes a claim for a specified sum, fees may be charged on that sum after the applicant has obtained judgment in his/her favour and after the amount has been paid by the judgment debtor.

Equally treated by Chapter V of this work is the need to incorporate international human rights covenants to which Nigeria is a party, into the national laws. This is premised on the fact that unless some of the rights are recognized under domestic laws, they cannot form an integral part of the justice and legal administration system of the country. Incorporation will therefore ensure imperativeness, expansion and enforcement of the range of human rights in Nigeria, for effective realization of all rights for the poor, as a strategy for poverty reduction.

Some of the reasons for the exploration of incorporation are based in particular on the fact that ESC rights are merely embodied in the Nigerian Constitution as aspirational goals with no legal effect, as well as the fact that the best platform for the individual to enforce his or her rights is at the national level and not before an international tribunal.

6.2 Implications of the research for legislation, policy and practice

The issue of enforcement of rights does not only centre on the legal framework but also policy, which is central to implementation as well as the actual practice of laws and through which the effects of legislation can be assessed. However, taking legislative steps is vital to the enforcement of all human rights.

Policy and legislative process are mutually reinforcing as implementation can inform the necessary amendment to laws in order to cure areas of problems of mischief. In this regard, governments need to effect necessary reforms in the administration of the justice sector by taking appropriate budgetary, administrative and legal steps to bring about the objectives of having a pro-poor access to justice mechanism and effective enforcement of all human rights as proposed in this work. This is because as noted by the Access to Justice Movement, sustained political commitment to in fact accomplish change is crucial to the success of reforms.

This work also has implications for the judiciary since it has a pivotal role to play in the access to justice model of a rights-based approach to the poverty reduction proposed. There is need for an independent, well funded and activist oriented judiciary, for the

proposed PIL model to function optimally. Judges will therefore need to be trained and retrained in human rights issues in order to sharpen their adjudicatory skills in the area of human rights. This will also spur judges to be more assertive and build the jurisprudence of the right of access to justice and human rights generally in Nigeria.

Granting of wide access to the people is likely to overburden the judiciary and the implication of this for policy and practice is to build capacity both in terms of human and material resources to cater for the likely overflow of cases, taking into consideration the ratio of judges in relation to the overall population and appropriate ratio prescribed, so that work overload does not lead to another serious problem of delay in court.

The implication of this work for legal jurisprudence is the necessary amendment of the Constitution to make it compatible with Nigeria's treaty obligations. Therefore, the government must take steps to domesticate the ICESCR to make it enforceable and repeal or amend section 6(6) of the 1999 Constitution that inhibits enforcement, in accordance with her treaty obligations.

Governments also need to implement ESC rights by adopting the budget standard approach (i.e. calculating the cost of purchases which are considered necessary to raise individuals or a family out of poverty – the level at which to set means-tested benefits and national assistance). In this regard, adequate budgetary appropriation towards implementing ESC rights must be made, at least to meet the minimum core obligations. Since there are different levels of human rights obligations imposed, governments as primary duty bearers, respecting, protecting, promoting and fulfilling rights should be made a cardinal and deliberate policy of governments.

6.3 Further questions raised by the research

There is the need to research further into the appropriate procedural and/or court reform required in Nigeria that will result in a fast-track process in courts to greatly reduce turnaround time for litigation. The research has to pay particular attention to the existing judicial hierarchy and determine whether the reform requires restructuring of the courts, procedure, administration or a combination of these and should propose appropriate reform(s). This has become necessary as a result of the inordinate delays that usually characterize litigation in Nigeria, which discourages rights enforcement or even the use of the legal process.

In view of the fact that cultural influences may act as a stumbling block to the poor, especially those in the rural communities from using the formal justice system, it might be necessary to carry out further research to determine the possibility of incorporating the informal justice system prevailing among the people and other informal justice systems in Nigeria into the mainstream judicial system and how best to achieve this, without compromising human rights standards.

Another issue that may be worthy of further research is the appropriate mechanism required for the effective enforcement of court orders, because if the court is to retain its sanctity and public confidence, its orders must be capable of immediate and effective enforcement. Otherwise, the court will be rendered irrelevant in the lives of the people, if they cannot rely on its orders and judgments as binding on every person and authority.

The last issue which this work believes will be worth researching into is with respect to the possibility of making acts of wanton corruption by political leaders, which creates or perpetuates poverty in their countries to constitute a crime against humanity. The effects of corruption produce elements of great suffering and serious injury to mental or physical health which may fit into other inhuman acts envisaged by Article 7(k) of the Rome Statute.

It can hardly be disputed that acts of wanton corruption do not result in great suffering amongst the people. The element of this offence that requires 'intention of causing such great suffering' is self-evident because leaders that engage in massive looting of the treasury must know or be deemed to know that the natural consequences will be to inflict great hardship on the people. Their accomplices should be tried along with them.

This proposition is based on the fact that there is similarity in the consequences of poverty to the types of acts that constitute crimes against humanity under the said Article 7, such as murder, extermination, imprisonment or other severe deprivation and torture.

The miseries of poverty and its effect on human rights, some of which have been examined in this work and covered by other works, include the types of offences recognized under Article 7 and should therefore shock human conscience. The fact that ruling a country into poverty is not an act that can be committed in a single day, makes the acts of leaders of such countries qualify as 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. The victims of the crime are the poor majority.

In this age of globalization, there is more extensive internationalization, rendering interior borders and barriers more and more irrelevant. The Millennium Development Goals (MDGs) set by the international community and the outcry against poverty in the world,¹⁸⁶³ clearly indicate that poverty is no longer a matter only for the internal concern

¹⁸⁶³ In 2005 there was the World United Against Poverty event, marked by demonstrations and musical concerts in major cities of the world (Philadelphia, London, Berlin, Paris and Rome) by a collection of the world's biggest pop stars, to pressurize leaders of the seven other wealthiest countries, who met in July 2005 in Scotland for the G8 summit, especially for debt cancellation for the poorest countries of the world, the majority of whom are in Africa and aid for Africa. See Elysa Gardner, *Pop world unites to sing out against poverty*, USA Today, 30 May 2005 <http://www.usatoday.com/life/music/news/2005-05-30-geldof-concerts_x.htm> accessed 4 April 2008. There was also a one-day action in 2007 participated in by people all over the world to hold governments to one of the UN MDGs goals of eradicating poverty by 2015. See X, *Global voices against poverty BBC News*, 16 October 2007 <<http://news.bbc.co.uk/2/hi/africa/7047616.stm>> accessed 4 April 2008.

of nations. Experts drawn from the World Bank, UNDP and UNICEF and coordinated by the office of the UN High Commissioner for Human Rights can articulate modalities for this, for instance, to determine the baseline that will constitute such an offence and other benchmarking. Transparency International, international human rights NGOs and local NGOs in the country in question can be invited to give necessary assistance on this.

There is colossal corruption around the world, especially in developing countries and perpetrators get away with all sorts of things. In most countries, there is impunity and perpetrators of acts of wanton corruption are usually not tried under national laws. This necessitates intervention at the international level. This work sees no difference between those accused of genocide and crimes against humanity and those leaders that have caused severe poverty, through acts of wanton corruption. Corruption for instance has been described as ‘an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.’¹⁸⁶⁴

There is thus the need to further examine the issues raised herein because the world is moving so quickly and the law must necessarily change to keep up with it. Cappelletti has said that ‘the law is an instrument of social order must undertake tasks unknown in previous times’.¹⁸⁶⁵ For instance, international criminal jurisdiction has advanced in the last ten years to such a level that could not have been contemplated 15 years ago. These have been necessitated by crimes which shock the world and these crimes have profoundly affected human rights and are committed under national laws, and the development of international jurisdiction is an additional protection of human rights.

Future exploration of the views raised in this work have the potential to further protect the human rights of the poor and make corrupt leaders accountable to the international community. It will also deter potential ones who might wish to loot money that would otherwise be available for providing basic infrastructure and the necessities of life for the people, especially the poor, in order to validate their worth of human dignity. This is more so, in view of the part of the preamble to the United Nations Convention Against Corruption which states that that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.

¹⁸⁶⁴ See The United Nations Convention Against Corruption, 2004 the Foreword by Kofi A. Annah at p. iii.

¹⁸⁶⁵ See Mauro Cappelletti, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, op. cit. p. 646.

6.4 Concluding remarks

This work has attempted to contribute to addressing poverty in Nigeria by drawing attention to the fact that now and in the future, the issue of accessing justice will always be central to the enjoyment and enforcement of all human rights, especially for the poor. This is predicated on the premise that both civil and political rights and ESC rights depend on enforcement, such that this work perceives the right of effective access to justice as *sine qua non* to the enforcement of all human rights without exception.

In Nigeria for instance, civil and political rights are constitutionally guaranteed as in most jurisdictions, yet there is the problem of enforcement in spite of their seeming to impose negative obligations on the government, thus evidencing that mere constitutional provisions are not sufficient to guarantee human rights, especially for the poor. The poor must therefore be assisted to activate those rights through appropriate legal mechanism(s) tailored to their needs. This work thus clearly harps on the need to facilitate access of the poor to justice as a rights-based approach to poverty reduction, through pro-poor enforcement mechanism(s) that will serve as a platform for effective enforcement of human rights, as a means of empowering the poor and alleviating poverty.

This work however states that it does not believe that access to justice alone, as a human rights-based approach, can solve the problem of poverty. This is in view of the acknowledged multidimensional nature of poverty, which makes it doubtful if one aspect of the rights-based approach standing alone without the others, can serve as an effective panacea to poverty reduction.